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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 167

JOSEPH POMPROWITZ, A SOLE TRADER, DOING BUSINESS AS L. C. L. TRANSIT COMPANY; GEORGE A. HORMEL & COMPANY AND OSCAR MAYER & COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

STATEMENT AS TO JURISDICTION

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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WISCONSIN

JOSEPH POMPROWITZ, A SOLE TRADER, DOING BUSINESS AS L. C. L. TRANSIT COMPANY, *Plaintiff;*

GEORGE A. HORMEL & COMPANY AND OSCAR MAYER & COMPANY,

Interveners,

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL.

In compliance with Rule 12 of the Supreme Court of the United States, as amended, plaintiff, Joseph Pomprowitz and intervening plaintiffs, George A. Hormel & Company and Oscar Mayer & Company, submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and order of the United States District Court of three judges on March 17, 1954. An application for appeal was presented to the District Court on May 13, 1954.

Statutes Conferring and Cases Sustaining Jurisdiction

The jurisdiction of the Supreme Court of the United States to review by direct appeal the final decree and order

of the District Court entered in this case is conferred by Title 28, U. S. C. A. 1253, 2101(b), and 2325.

The jurisdiction of the Supreme Court to review on direct appeal, the final judgment in this case is sustained by many cases, including the following:

United States v. *Hancock Truck Lines, Inc.*, 324 U. S. 774;

Louisville & Nashville Railroad Co. v. *United States*, 242 U. S. 60;

North Carolina v. *United States*, 325 U. S. 507;

United States v. *United Smelting, Refining and Mining Co.*, 339 U. S. 186;

American Trucking Assns. v. *United States*, 326 U. S. 77;

Alabama G. S. R. Co. v. *United States*, 340 U. S. 216;

American Trucking Assns. v. *United States*, 344 U. S. 298.

Statutes Involved

Title 49, U. S. C. A. Section 309:

"Contract carriers by motor vehicle—(a) Permit to operate; carriers in bona fide operation on July 1, 1935; * * * 'grandfather' provisions:

"(1) Except as otherwise provided in this section and in section 310a of this title, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business: Provided, That, subject to section 310 of this title, if any such carrier or a predecessor in interest was in bona fide operation as a contract carrier by motor vehicle on July 1, 1935, over the route or routes or within the territory for which application is made and

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has so operated since that time, or, if engaged in furnishing seasonal service, only, was in bona fide operation on July 1, 1935, during the season ordinarily covered by its operations, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such permit, without further proceedings, if application for such permit was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on July 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such permit. Otherwise the application for such permit shall be decided in accordance with the procedure provided for in subsection (b) of this section and such permit shall be issued or denied accordingly. Pending determination of any such application the continuance of such operation shall be lawful. Any person, not including within the foregoing provisions of this paragraph, who or which is engaged in transportation as a contract carrier by motor vehicle when this section takes effect, may continue such operation for a period of one hundred and twenty days thereafter without a permit and, if application for such permit is made within such period, the carrier may, under such regulations as the Commission shall prescribe, continue such operation until otherwise ordered by the Commission. * * *"

"Application for permit; form and contents; issuance of permit; terms and conditions:

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 310 of this title, a permit shall be issued to any qualified applicant therefor

authorizing in whole or in part the operations covered by the application, if it appears from the application or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this chapter and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in the Interstate Commerce Act; otherwise such application shall be denied. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof and shall attach to it, at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the Commission under section 304(a)(2) and (6) of this title: Provided, however, That no terms, conditions or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of the permit, or to add to his or its equipment and facilities, within the scope of the permit as the development of the business and the demands of the public may require. * * *"

Title U. S. C. A. 49, Section 312:

"Suspension, change, revocation and transfer of certificates, permits, and licenses:

"(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be sus-

pended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license; Provided, however, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: And provided further, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311(c), 317(a), or 318(a) of this title, or with any lawful order, rule, or regulation of the Commission promulgated thereunder."

The Nature of the Case

This is an action in which the plaintiff sought to set aside a Report and Order of the Interstate Commerce Commission in a proceeding decided March 16, 1950, known as No. MC-31466 (Sub-No. 7) Joseph Pomprowitz Extension—Packing House Products. Said Report and Order is attached hereto, marked *Appendix A.*

The complaint in said action, in paragraphs numbered 4 to 16, both inclusive, thereof, sets forth that pursuant to the "grandfather" clause proceeding complainant was granted authority as a contract motor carrier, to transport "Dairy products, dairy by-products, manufactured or prepared foods, and materials and supplies and equipment used or useful in the production thereof, between various points as designated therein, under contracts with persons who operate * * * food processing businesses." That this "grandfather" authority was issued as of November 27, 1943; that said order was subsequently, June 29, 1944, modified slightly by increasing the extent of the Wisconsin territory, but no change was made in the commodity description; that, beginning with May, 1944, complainant negotiated and executed contracts with meat packers for the transportation in their behalf, of fresh meats and edible packing house products under the authority hereinabove referred to, giving him the right to transport "manufactured or prepared foods" and pursuant to the Commission's rules, filed contracts and rate schedules covering such operations, naming among other items, the fresh meats and specific packing house products which he thereby undertook to transport, and which rate schedules contained the specification of the operating authority under which such transportation services were to be performed; that the Commission was thereby specifically advised of his intention to transport said fresh meats and edible packing house products under the authority to transport "manufactured or prepared foods"; that until the Commission's decision and order of March 16, 1950, in its docket No. MC-31466 (Sub-No. 7), there was no challenge by it of the complainant's right to perform the services above referred to, pursuant to contracts and rate schedules which had been filed with and accepted by the Commission; that in reliance upon the circumstances, complainant built up a substantial volume of business by reason

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of which it was necessary for him to expand his operating personnel and expend considerable sums of money to provide additional equipment in order to move the traffic; that on several occasions prior to September 23, 1946, the Director of District No. 9 of the Commission's Bureau of Motor Carriers, Mr. W. E. Hustleby, with offices at Minneapolis, had advised the complainant and his traffic representative, Mr. Adolph E. Solie, of Madison, Wisconsin, that he felt there was some question as to whether or not "fresh meats" were embraced within the term of "manufactured or prepared foods", and a conference was held in the Commission's Field Office at Milwaukee, Wisconsin, at which the District Director and the local District Supervisor, together with representatives of complainant, were present, and at which time the complainant was advised by the representatives of the Commission through his representatives, that he could continue the transportation of fresh meats and edible packing house products, until further notice; that thereafter, said Hustleby advised complainant's representative, that the Commission had indicated informally, that packing house products fit for human consumption could be transported under the authority to transport "manufactured or prepared foods", but that this did not include the right to transport inedible packing house products, nor "fresh meats", and on December 6, 1946, said Hustleby advised the complainant's traffic representative, that unless complainant proceeded to file an application with the Commission for an unofficial interpretation as to whether or not the term "manufactured or prepared foods" also embraces fresh meats and edible packing house products, complainant would be expected to forthwith discontinue any operations which he might be performing in the transportation of those commodities; that thereafter, upon the insistence of the Commission's staff, above referred to, an application was filed with the Commission for the purpose of clarifying the

misinterpretation placed upon the terms of the authority granted to the applicant in the manner hereinbefore set forth; that the Commission denied plaintiff's application by its order dated March 16, 1950, and undertook to determine, by going back of the language in the permit, and by resorting to other terminology used for other purposes, that the words "manufactured or prepared foods" do not include fresh meats or edible packing house products. The said document dated March 16, 1950, is referred to as "Report and Order of the Commission", and is hereinbefore referred to as being included in Appendix A hereto attached; that thereafter, due proceedings were had before the Commission, seeking reconsideration by it and that in each instance complainant's petition was denied; complainant further alleged that the order of the Commission deprived complainant of his property without due process of law, and was in violation of the Fifth Amendment of the United States Constitution; that it was arbitrary, discriminatory, and beyond the jurisdiction and power of the Commission, and therefore, unlawful, and should be set aside.

That the intervening complainants joined in the complainant's averments above referred to, and further alleged that in reliance upon the authority granted to complainant as hereinbefore stated, they had built up a substantial business from their respective plants to markets served by the complainant, and that the order of the Commission sought to be set aside, operates to deprive them of these markets and the business so developed, (Paragraphs 5 and 6 of interveners' complaint); that the order of the Commission dated March 16, 1950, in said matter, MC-31466 (Sub-No. 7) is unlawful and void and beyond the power of the Commission to make, for the following reasons: In that it was arbitrary and capricious, in holding that edible packing house products and fresh meats are not "manufactured or prepared foods", and that meat packing houses are not in the food processing

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business, as those terms are used in the authority granted in said docket, (Paragraph 10, interveners' complaint).

The decision of the Interstate Commerce Commission entered on March 16, 1950, is reported in 51 MCC 543.

This action was commenced on the 10th day of October, 1951. The three-judge court of the United States District Court of the Eastern District of Wisconsin, in making its decision, in effect made the same findings of fact and conclusions of law as were prepared and submitted to it by the Commission. It denied the application for injunction to restrain the enforcement of the Commission's order of March 16, 1950, and dismissed the complaint.

Copies of the Opinion, Findings of Fact, Conclusions of law, and the Final Decree of the District Court, are attached hereto as *Appendix B.*

The Opinion of the District Court is not reported as yet.

The Questions Involved

1. May a contract motor carrier transport fresh meats and edible packing house products produced by meat packers, under a permit authorizing such carrier to transport "manufactured or prepared foods" produced by "persons who operate * * * food processing businesses"?

2. Does the Interstate Commerce Commission have statutory authority to undertake, several years after granting a permit to a contract motor carrier, to restrict the scope of the permit issued by it by holding that "manufactured or prepared foods" does not include fresh meats and edible packing house products, after the carrier has spent large sums of money and obligated himself under important contracts in reliance upon that permit?

3. Where the Interstate Commerce Commission has issued a permit to a contract motor carrier, and in reliance upon that permit, certain meat packers who operate food

processing businesses have established important markets for their fresh meats and edible packing house products, may the Commission at a long subsequent date, prohibit the transportation of fresh meats and edible packing house products by the contract motor carrier to whom such permit has been issued, on the ground that "manufactured or prepared foods" do not include fresh meats and edible packing house products?

4. May the Commission prohibit the transportation of fresh meats and packing house products under such a permit issued to such contract carrier, after it has for years accepted and approved contracts and schedules of minimum rates specifically defining therein the commodities to be transported thereunder?

5. When the evidence presented before the Commission was addressed primarily to the issue raised by the Commission as to the scope of the outstanding permit, should the court have remanded the proceeding to the Commission for further hearing to permit the taking of further testimony addressed to the other question before the Commission, as to whether additional authority should be granted to the holder of that permit, in order to permit of the transportation of the commodities here under consideration?

6. May the Commission, having issued an authority which has been in existence over a period of years, undertake to arbitrarily redefine the language used in that permit and in order to do so, go back of the permit to determine in 1950 what it meant when it granted the permit in 1944 thereby depriving the holder of the permit of property rights acquired and held by him over a period of six years?

7. The several Assignments of Errors, numbered 1 to 13, both inclusive, set forth in a separate document herein, are included herein as questions presented herewith.

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The Questions Involved Are Substantial

It is respectfully submitted that in the event the Commission is permitted to reduce or limit the extent of a motor carrier's authority, six years after the issuance of a permit, pursuant to "grandfather" proceedings, then the holder of a permit has no security in the permit, nor can he rely upon the action of the governmental agency issuing same. The basic question involved as to whether the Commission has the authority to reduce the scope of a contract motor carrier's permit, affects not only the plaintiff carrier and the intervening shippers herein, but also all carriers holding permits issued by the Commission, and all shippers making use of motor carriers facilities—both contract and common. The carrier is at the mercy of the regulatory body, after such carrier has been lulled into security by (1), the active conduct of the Commission in issuing the permit, and (2), the passive conduct of the Commission in accepting contracts and schedules of minimum rates, specifically delineating the articles proposed to be transported under that permit, and without making objection thereto, bearing in mind that he has, in the meantime spent large sums of money developing the business and incurring obligations under contracts in reliance upon the permit so issued.

Attention is called to the Statute, *Title 49 U.S.C.A.* Section 309(b), where the following words are contained:

> "The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and shall attach to it at the time of issuance and from time to time thereafter, such reasonable terms, conditions, and limitations consistent with the character of the holder as a contract carrier as are necessary to carry out, with respect to the operations of such carrier, the requirements established by the commission under section 304(a) (2) and

(6) of this title. Provided, however, that no terms, conditions, or limitations shall restrict the right of the carrier to substitute or add contracts within the scope of that permit, or to add to his or its equipment and facilities, within the scope of the permit as the development of the business and the demands of the public, may require."

Title 49 U.S.C.A. Section 304(a) (2) relates to the keeping of accounts, records and reports, hours of service, and safety. Section 304(a) (6) relates to the duty of the commission to administer, execute and enforce all provisions of said chapter, to make all necessary orders in connection therewith, and to prescribe rules, regulations, and procedure for such administration. Neither of these two paragraphs is relevant here.

It is submitted that if the Commission can go behind the permit to determine the scope of the simple language used therein, as they have attempted to do in this case, then the words of the Statute above quoted, requiring them to define the scope of the authority in the permit, are meaningless, and a permit serves no purpose.

These questions are of importance because they apply not only to this carrier but to every other contract or common carrier to whom the Commission may have issued a permit or certificate since the enactment of the Motor Carrier Act of 1935.

The duty of the Commission is to look to the permit for meaning and not to go behind it. There is no power in the Commission to change the permit at will. This would violate the provision of Title 49 U.S.C.A. 312, allowing suspension, change, or revocation, only in the event of a willful failure to comply with the Act, of lawful orders or regulations of the Commission, or for specific conditions or limitations recited in the permit. *United States* v. *Rock Island M. Trans. Co.*, 340 U.S. 419, 435.

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There is nothing in this permit calling for interpretation of technical language or determination by a body of experts such as in a rate case. The language is plain and unambiguous. It should not be disturbed.

In *Great Northern Railway Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 294:

> ". . . Here no fact, evidential or ultimate, is in controversy; and there is no occasion for the exercise of administrative discretion. The task to be performed is to determine the meaning of words of the tariff which were used in their ordinary sense and to apply that meaning to the undisputed facts. That operation was solely one of construction; and preliminary resort to the Commission was, therefore, unnecessary . . ."

If the Commission intends to restrict a commodity such as "foods", it should do so in unmistakable terms, as it usually has done in the past. Clearly, the word "foods" covers "meats", unless it specifically restricts "meats" from the term. If the Commission does not, or did not intend the transportation of all 'foods', it has, or had other more restrictive language at its command.

We call attention to the case of *Matthews Extension of Operations* v. *Frozen Foods*, 48 M.C.C. 137, where authority was given to transport "frozen foods". The Commission, through Division 5, in that matter spoke of "meat" as a prepared food in the following language, at page 139:

> ". . . In the near future, it contemplates expanding its business especially in the prepared food line. It proposes to utilize the freezing and storage capacity of plants in the New York area for the preparation of frozen fish, *meat and other prepared food products* during the off season for freezing fruits and vegetables. These frozen *prepared foods* would be shipped from points of storage in the New York area to various points in the territory involved herein . . ." (Emphasis Supplied)

In *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, the court criticized the Commission for unduly particularizing the commodities which could be carried in the future.

In the case here presented, we have the anomalous situation of the trial court holding that the intervening plaintiffs are in the "food processing" business and at the same time holding that the prepared foods processed, or the prepared foods which they handle, may not be transported by the plaintiff carrier under a permit granting him the authority to transport "manufactured or prepared foods" for persons who operate "food processing" businesses.

We again submit that the questions involved in this case, are of importance, because they apply not only to this carrier but to every other contract or common motor carrier to whom the Commission may have issued a permit or a certificate, since the enactment of the Motor Carrier Act in 1935.

Respectfully Submitted,

(Signed) DINEEN, GLEASON, SHAUGHNESSY & DINEEN,

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Dated May 11th, 1954.

Note: There is attached hereto as Appendix C a complete statement of the Permit in question.

APPENDIX A

INTERSTATE COMMERCE COMMISSION

No. MC-31466 (Sub-No. 7)

JOSEPH POMPROWITZ EXTENSION—PACKING HOUSE PRODUCTS

Submitted September 20, 1948. Decided March 16, 1950.

Operation by applicant as a contract carrier by motor vehicle of described commodities, between described points in Wisconsin, Iowa, Minnesota, and Illinois, over irregular routes, found not consistent with the public interest and national transportation policy. Application denied.

Clarence M. Todd, Jr., and Adolph Solie for applicant.

S. L. Foote, S. H. Johnson, and Warren H. Wagner for interveners in support of the application.

Franklin R. Overmyer, Jack Goodman, David Axelrod, Claude J. Jasper, J. F. McGrath, P. M. Greensbert, H. C. Ahlberg, Gregory Gramling, George E. Wiard, Frank M. Coyne and Clarence Omviedt for interveners in opposition to the application.

REPORT OF THE COMMISSION

Division 5, Commissioners Lee, Rogers and Patterson by Division 5:

Exceptions were filed by applicant and interveners in support of the application to the order recommended by the examiner, and certain interveners in opposition replied.

By application filed February 14, 1947, as amended, Joseph Pomprowitz, doing business as L.C.L. Transit Company, of Green Bay, Wis., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of meat, meat by-products, dairy products, articles distributed by meat packing houses, and materials and supplies used by, or useful to, packing houses, between Barron, Rice Lake, Superior, and Ashland, Wis., and Duluth, Minn., points

in that part of Wisconsin on and south of Wisconsin Highway 64 from Marinette to Merrill, Wis., on the east of U.S. Highway 51 from Merrill to Wausau, Wis., on and south U.S. Highway 29 from Wausau to junction of U.S. Highway 12 (near Elk Mound, Wis.) and on and south of U.S. Highway 12 from said junction to the Wisconsin-Minnesota State Line, including points in Kewaunee and Door Counties, Wis., Ottumwa, Burlington, and Keokuk, Iowa, points in Iowa in an area on and south of U.S. Highway 18 from Marquette to Garner, Iowa, on and east of U.S. Highway 69 from Garner to Des Moines, Iowa, and on and north of U.S. Highway 6 from Des Moines to Davenport, Iowa, points in Minnesota within an area on and east of U.S. Highway 169 from the Iowa-Minnesota State line to a point in the vicinity of St. Louis Park, Minn., and on and south of U.S. Highway 12 from said point to the Minnesota-Wisconsin State line, and points in Illinois on and north of U.S. Highway 36.

Oscar Mayer and Company and George A. Hormel Company, meat packing concerns, intervened in support of the application, and 22 motor carriers and 2 motor-carrier associations intervened in opposition thereto.

Applicant now holds a permit, issued pursuant to the "grandfather" clause provisions of the Interstate Commerce Act, authorizing the transportation among other things, of dairy products, dairy by-products, manufactured or prepared foods, and materials, supplies, and equipment used or useful in the production thereof, and of household goods, under contracts with persons who operate cheese and food processing businesses, within the territory sought in the instant application. He is here seeking primarily a determination of whether the phrase, "manufactured or prepared foods" as contained in his present permit includes fresh meats and the other commodities described in the application. In the event we find otherwise, he seeks authority to extend his present operations to include the transportation of such additional items.

Applicant is a class I motor-contract carrier, and has his principal headquarters at Green Bay. He maintains a terminal and repair shop at that point and terminals or

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terminal arrangements at Milwaukee and Beaver Dam, Wis., Iron Mountain, Mich., Freeport, Chicago, Madison, Monroe, and Galena, Ill., Cedar Rapids, Iowa, and South St. Paul, Minn. He owns and operates 172 pieces of equipment consisting of 3 passenger cars, 5 pick-up vehicles, 69 tractors, and 79 semi-trailers. The semi-trailers are insulated and have closed van bodies, 28 of them being mechanically refrigerated and the remainder, with the exception of 4, being capable of refrigeration by icing. Applicant does not advertise his services nor does he employ solicitors. He now has contracts with, and is providing service for 30 shippers, 7 of whom are meat packers. His service comprises (a) highway peddling or distribution for the shippers along specific routes in a more or less single direction, (b) radial peddling, which involves the transportation of the shipments to a given point where they are transferred to another vehicle for delivery to the surrounding area, and (c) territorial peddling, which is a combination of the two preceding types. In addition, he provides a so-called "dump-load" service, transporting the shipments to a transfer point and there delivering them to a local cartage company for distribution to the ultimate destinations. Applicant for sometime has been transporting fresh meats under color of his authority to transport prepared and manufactured foods.

The application is supported by several shippers engaged in the meat-packing business. One of these operates plants at Chicago, Madison, Davenport, Iowa, and Prairie du Chien, Wis. The Chicago plant is devoted to the processing of raw products which are received from Madison, Davenport, and Prairie du Chien. The Davenport plant is a hog-processing plant, and the Prairie du Chien plant is both a slaughtering and processing plant. The shipper operates 150 pieces of its own equipment in which it handles the major portion of its traffic. Applicant's service is used in the weekly delivery of its products in truckload lots from Madison to points in Michigan, and in the transportation of truckload shipments of fresh meats from Green Bay to Chicago and of fresh and cured meats from Madison to the Twin Cities area. The service is described as satis-

factory. Thus far it has not been used from Prairie du Chien to Davenport, but will be used in the future. The shipper desires to reduce its private-carrier operation if and when for-hire service can be obtained at comparable cost and to employ the service of applicant and other contract carriers within the considered territory. It asserts that insulated and refrigerated equipment with beef rails is required for its products, although it concedes that its own equipment is not completely refrigerated. In its opinion fresh meats are a prepared or processed food for the reason that the animal has to be slaughtered, its hide removed and washed, the carcass cut up and entrails removed, and the meat placed in coolers for given periods of time to reduce its temperature. There are 32 grades of beef, which have to be graded, and a great deal of skill is required in the described operations. Also, many packers cut the meat into quarters or smaller sizes, and bone and ship it in containers for use in making sausages. The shipper's primary interest in this proceeding is not for a broadening of applicant's territorial operations; but instead it seeks principally a finding that fresh meats are a manufactured or prepared food within applicant's present authority. It concedes that no need exists for additional service from Chicago as there is now ample service from that point. It uses various motor carriers in the territory under consideration, including a contract carrier whose service, however, is described as less satisfactory than applicant's. It desires that applicant be authorized to transport all types of packing house supplies from Chicago which are now transported by the shipper in its own equipment.

A packing house concern with plants at Newport, Minn., handles all classes of meat prepared in the manner described by the preceding witness, including items not intended for human consumption. It uses applicant's service on truckload and less-truckload shipments to points in Wisconsin and Michigan, and to and from Chicago. It also uses the services of other carriers to certain points, and describes such service as satisfactory. Ninety-five percent of the traffic handled by applicant is delivered to

local draymen at centrally-located points, and the latter make distribution to final destination. The shipper is interested in obtaining an interpretation of applicant's present authority that will permit him to transport fresh meats. Its representative, employed in its traffic department, expressed the opinion that the term "manufactured or prepared foods" includes fresh meats, and asserts that it is important that applicant be authorized to handle that commodity as well as other packing house products and supplies. The shipper's interest is primarily in obtaining cheaper transportation.

A meat packer with plants at Albert Lea, Minneapolis, and Faribault, Minn., and at Cedar Rapids and Chicago, ships fresh and cured meats and packing house products to points in the described territory. It makes no complaint against the presently available services, and confines its interest in this proceeding to the request for an interpretation of applicant's authority that would permit the transportation of fresh meats and other packing house products.

A meat packer at South St. Paul until recently shipped fresh meats and various packing house products to points in Iowa. The service available, however, allegedly has been so unsatisfactory that it now ships to those points from its Omaha plant. It has not used applicant's service to Iowa because of the question of whether the rates on manufactured food products are applicable to its products. Its traffic manager expressed the view that its products are included in the term "manufactured or prepared foods". It has used common carrier service extensively, some of which is described as satisfactory and some as unsatisfactory because the carriers refuse to handle fresh meats except during the winter months. Its representative could not give any assurance that it would resume its shipment from South St. Paul should the instant authority be granted. Its interest here is to obtain an interpretation of applicant's present authority that will permit him to transport fresh meats and other packing house products.

A meat packer with a plant at Austin, Minn., sells its products in Wisconsin and Iowa, using its own equipment and the service of rail and motor carriers. Applicant's

service is used to certain points other than Chicago, its rates to the latter point being described as less favorable than the rail rates. The shipper seeks an interpretation of applicant's authority that will permit him to transport fresh meats.

Wheeler Transportation Company is a motor-common carrier authorized, among other things, to transport general commodities, with exceptions, over regular routes serving certain intermediate and off-route points, including South St. Paul and Newport, (a) between Minneapolis and Fond du Lac, Wis., (b) between Abbotsford and Wausau, Wis., (c) between Eau Claire and Neenah, Wis., (d) between Green Bay and Sheboygan, Wis., (e) between Madison and Stevens Point, Wis., (f) between Green Bay and Milwaukee, and (g) between various other points in Wisconsin. It is also authorized to transport general commodities, with exceptions, over irregular routes between Minneapolis, St. Paul, South St. Paul, Invergrove, West St. Paul, Newport, North St. Paul, Columbia Heights, Robbinsdale, St. Louis Park, Hopkins, Edina, Richfield, Red Rock, McCarron Lake, Fort Snelling, and State Fair Grounds, Minn. In addition, it is authorized to transport (1) meats and packing house products in truckloads between Fond du Lac and Milwaukee and from St. Paul and South St. Paul to Wisconsin Rapids, Wis., (2) packing house products between Milwaukee and Madison, and (3) packing house products, and supplies, advertising matter, and premiums used in connection therewith, between Menasha and Neenah, Wis., on the one hand, and, on the other, points in a described area in Wisconsin. Its equipment includes 30 trailers, 18 of which are insulated refrigerator units equipped for the handling of fresh meats. It engages extensively in the transportation of fresh meats and packing house products. During January 1948 it handled 662,000 pounds of such products from the Twin Cities to Milwaukee and 159,000 pounds between the Twin Cities and Madison. About 55 percent of its eastbound tonnage consists of packing house products, averaging about 2,000,000 pounds per month to points in Wisconsin.

Olson Transportation Company is a motor-common carrier of general commodities, with exceptions, between Chi-

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cago and a described radius thereof, on the one hand, and points in Wisconsin bounded by Green Bay on the northwest and Gills Rock, Wis., on the north-east, on the other, over regular routes. It operates an excess of 50 units in the transportation of fresh meats, 6 of which are mechanically refrigerated. It serves various meat packing concerns and asserts that applicant has recently become a competitor between Green Bay and Chicago and has diverted the traffic of one of its shippers due to a difference in rates.

Clipper Transit Company is a motor-common carrier of general commodities, with exceptions between Chicago and various points in Wisconsin, over regular routes. It operates 6 mechanically refrigerated units and 20 insulated trailers suitable for the transportation of fresh meats and packing house products. It has unsuccessfully solicited shipments of fresh meats from Green Bay to Chicago.

West Shore Express, Inc., is a motor-common carrier of general commodities, with exceptions, operating between Milwaukee, Green Bay, and Sheboygan. It operates 4 units of equipment which it refrigerates by icing. It has several competitors serving the same territory, and interchanges traffic to and from off-line points with other carriers. It asserts that the territory it serves is small and does not have sufficient traffic to support an additional carrier.

The examiner found (1) that the term "manufactured or prepared foods" does not include fresh meats and packing house products, (2) that no need has been shown to warrant a grant of the requested authority, and (3) that applicant's contract-carrier status in respect of the proposed authority is questionable. He recommended that the application be denied. Interveners in support of the application on exceptions contend that applicant should be authorized to transport fresh meats and all other packing house products within its present territory in order that a complete service may be provided the meat packers. They argue that fresh meats and packing house products are manufactured or prepared foods. Applicant on exceptions restates his purpose of seeking a clarification of his present authority and not an extension of rights. He contends that the examiner

erred (1) in not finding that the commodities described in the application are contained in the term "manufactured or prepared foods", (2) in considering the question of intent with respect to the scope of the authority, and (3) in questioning his status as a contract carrier. On reply, interveners in opposition to the application urge that the examiner's conclusions be affirmed.

The principal question posed by applicant is whether the term "manufactured or prepared foods" as used in his present permit embraces packing house products generally and fresh meats in particular. In our opinion it does not. In the first place, the term in question contemplates only those food items which are fit for human consumption, and necessarily excludes, therefore, the numerous packing house products not so adapted. The term packing house products has long had a peculiar meaning of its own in the transportation industry, and has been found to include the articles listed in the appendix to the report in *Modification of Permits—Packing House Products*, 48 M.C.C. 628. While the term embraces certain "prepared foods" it does not follow that authority to transport "manufactured or prepared foods" extends to all of the articles contained in the appendix. The transportation of meat and packing house products is somewhat of a specialized type of service, in behalf of meat packing houses which in the conduct of their business process, manufacture, and distribute many articles of food. In the instant case the authority granted applicant to engage in the transportation of manufactured or prepared foods provides that the service shall be performed only for persons who operate cheese and food processing businesses. To construe such authority as authorizing the transportation of fresh meats would be unreasonable and contrary to the sense in which the term was used. Despite the preliminary processes that may be required in rendering them salable, fresh meats are not a manufactured or prepared food within the meaning of the commodity description used in applicant's authority any more than they could be considered as groceries, a proposition we rejected in *Hazelwood Extension—Packing House Products*, 49 M.C.C. 53. They may become a manufactured or prepared food only

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after they have been converted from their natural state into a different form.

Applicant cannot validly claim any basis for the alleged belief that the grant of manufactured or prepared foods authorized him to transport fresh meats. His permit was granted after protracted "grandfather" proceedings in which he specifically claimed the right to transport fresh meats and packing house products. In granting manufactured or prepared foods, the Commission, division 5, denied authority to transport fresh meats and packing house products; and in a companion application disposed of at the same time, No. MC-31466 (Sub-No. 2), it found that the requested authority to transport such commodities would not be consistent with the public interest or the national transportation policy. See *Pomorowitz Contract Carrier Application*, 28 M. C. C. 241, 43 M. C. C. 821, and 43 M. C. C. 822. Thus, if any ambiguity justifying us in examining the record which lead to the issuance of applicant's authority could be said to exist and if such record were examined it would be clear that there never was any intent in granting authority to transport manufactured or prepared foods, to grant authority to transport fresh meats and packing house products generally.

We come now to the question of whether the evidence establishes a need for a grant of authority to engage in the described transportation. In our opinion it does not. As seen, applicant concentrated the presentation of his case upon the issue already considered. As a consequence, the evidence does not establish that the needs of the supporting shippers cannot be met by existing carriers. To the contrary, it strongly suggests the conclusion that their support of the application is based upon the element of rates rather than service and that, of course, is not a proper predicate for a finding that the proposed service would be consistent with the public interest and national transportation policy. We conclude that the application should be denied.

We find that applicant has failed to establish that the proposed operations would be consistent with the public interest and the national transportation policy, and that the application should be denied.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 5, held at its office in Washington, D. C., on the 16th day of March, A. D. 1950

No. MC-31466 (Sub-No. 7)

Joseph Pomprowitz Extension—Packing House Products

Investigation of the matters and things involved in this proceeding having been made, and said division, on the date hereof, having made and filed a report herein containing its findings a fact and conclusions thereon, which report is hereby made a part hereof;

It is ordered, That said application, be, and it is hereby, denied.

By the Commission division 5.

W. P. BERTEL,
Secretary.

(SEAL)

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 5396

JOSEPH POMPROWITZ, a Sole Trader Doing Business as L. C. L. Transit Company, *Plaintiff*,

GEORGE A. HORMEL & COMPANY and OSCAR MAYER & COMPANY, *Intervenors*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

OPINION

Before Duffy, Circuit Judge, and Stone and Tehan, District Judges

DUFFY, Circuit Judge. This is a suit to enjoin and set aside an order of the Interstate Commerce Commission

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entered March 16, 1950 (reported in 51 M. C. C. 343), in a proceeding entitled Joseph Pomprowitz Extension—Packing House Products, Docket No. MC-31466 (sub-No. 7). Plaintiff is a contract carrier operating under the authority of permits for, among other things, transportation within certain defined areas of "dairy products, dairy by-products, manufactured or prepared foods and materials, supplies and equipment used or useful in the production thereof, and household goods under contracts with persons who operate cheese and food processing businesses."

At the suggestion of the Commission, plaintiff filed an application seeking a determination whether "manufactured or prepared foods" as contained in his operating authority includes fresh meats and packing house products. In the event of an adverse decision, plaintiff sought in the alternative additional authority under ¶ 209 (b) of the Act, 49 U. S. C. A., ¶ 309 (b), to extend his present operations to include the transportation of fresh meats and packing house products. The application was supported by George A. Hormel & Company and Oscar Mayer & Company, intervening plaintiffs herein, and was opposed by 22 motor carriers and two motor carrier associations.

The application was assigned for hearing before an examiner who at that time had not been appointed pursuant to ¶ 11 of the Administrative Procedure Act, 5 U. S. C. A., ¶ 1010. At the hearing before the examiner no objections were made as to his qualifications. He thereafter recommended findings that the "grandfather" authority issued to the carrier did not authorize the transportation of fresh meats and packing house products. He also recommended that the authority which plaintiff sought in the alternative should be denied. Division 5 of the Commission considered this report and on March 16, 1950, entered its own report and order sustaining the view of the examiner. Thereafter, on November 6, 1950, the entire Commission denied petitions for reconsideration and further hearing which had been filed by plaintiff and the intervening plaintiffs. On January 15, 1951, plaintiff and the same intervenors again petitioned for reconsideration and new hearing. On March 5, 1951, the entire Commission dismissed said petitions under Rule

101(f) of the Commission's General Rules of Practice.[1] On June 25, 1951, plaintiff and on June 29, 1951, the intervening plaintiffs filed with the Commission their respective petitions requesting that the proceedings be re-opened and assigned for hearing before an examiner who had been appointed under the provisions of the Administrative Procedure Act. This action was commenced on October 10, 1951, and on December 10, 1951, the Commission denied the respective petitions filed on June 25 and June 29, 1951.

The first question for consideration is plaintiff's claim that he did not have a full and fair hearing because the examiner had not qualified under the Administrative Procedure Act. There is no suggestion that the examiner exhibited any bias or favoritism. It was not until 15 months after the date of the order and report of the Commission that plaintiff claimed for the first time that the examiner was not qualified. This was about 7 months after the record was closed. The objection came too late; it was not timely made. *United States et al.*, v. *L. A. Tucker Truck Line, Inc.* 344 U. S. 33; *Monumental Motor Tours, Inc.* v. *United States*, 3-judge court, 110 F. Supp. 929, 932.

The second point urged by plaintiff is that the order of the Commission was arbitrary and discriminatory when it determined that the term "manufactured or prepared foods" contained in plaintiff's present authority does not embrace fresh meats and packing house products.

Although the Commission did not state in its decision that the intervening plaintiffs were not in the food processing business, such a contention seems to be made before us. We think, however, there is nothing in this record to sustain such a conclusion. In fact in its decision herein the Commission said that meat packing houses "in the conduct of their business *process*, manufacture and distribute many articles of food." It has been held that the slaughtering department of a packing house performs a "processing operation" under the Fair Labor Standards

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[1] This rule provides that successive petitions based upon substantially the same grounds as a former petition which had been considered and denied will not be entertained.

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Act. *Walling* v. *Peoples Packing Co., Inc.*, 10 Cir., 132 F. 2d 236, 240. We hold that the intervening plaintiffs are in the food processing business within the meaning of that phrase as used in plaintiff's operating authority.

The Commission found that the term "manufactured or prepared foods" as used in plaintiff's permit does not embrace packing house products generally, and fresh meats in particular. The Commission stated, "Despite the preliminary processes that may be required in rendering them salable, fresh meats are not a manufactured or prepared food within the meaning of the commodity description used in applicant's authority * * *. They may become a manufactured or prepared food only after they have been converted from their natural state into a different form."

The Commission emphasized that plaintiff's permit was granted after protracted "grandfather" proceedings in which he specifically claimed the right to transport fresh meats and packing house products, and that in granting "manufactured or prepared foods" the Commission denied to plaintiff the authority to transport fresh meats and packing house products. The Commission also notes that in a companion application disposed of at the same time, it found that the requested authority by plaintiff to transport such commodities would not be consistent with the public interest or the national transportation policy. The commission then concluded that there never was any intent to grant authority to plaintiff to transport fresh meats and packing house products generally when it granted plaintiff authority to transport manufactured or prepared foods.

Plaintiff argues that the words "fresh meats and packing house products" are not ambiguous and urges that neither the Commission nor this court has the right to go back of the permit itself to determine the meaning or the proper application of those words. Plaintiff insists that fresh meat is a processed or a prepared food obtained by the slaughter of live animals, after which it is necessary to remove hides, hoofs, and entrails, to wash the meat, and then to cut same into desirable and useful sizes.

We concede the words "fresh meat" are not ambiguous but we think that the words "manufactured or prepared foods" as used in the plaintiff's authority are uncertain in their meaning. It is well settled that where the language contained in a permit or a certificate is ambiguous, the Commission may interpret such language whenever it becomes necessary to define the exact limits of the carrier's authority and the court will give great weight to such interpretation unless it is clearly erroneous or arbitrary.

In *Dart Transit Co.* v. *Interstate Commerce Commission, et al.*, 3-judge court, 110 F. Supp. 876, in sustaining the powers of the Commission to interpret the permit, the court stated, "It is our opinion that in an action such as this, a court may not substitute its judgment for that of the Commission with respect to the question of the scope or coverage of a permit which the Commission has issued to a motor carrier, if that question is at all doubtful. In *Noble* v. *United States*, 319 U.S. 88, 93, * * * the Supreme Court said, 'The precise delineation of an enterprise which seeks the protection of the "grandfather" clause has been reserved to the Commission.' By the same token we think that within reasonable limits it is for the Commission to determine the scope of the 'delineation.' "

"The Commission's construction of its certificates, unless clearly wrong or arbitrary, is to be accepted by the courts." *United Truck Lines, Inc.* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817. "At best, the Commission's order is ambiguous. So regarding it, its interpretation is for the Commission; and the courts cannot disregard such an interpretation in those circumstances unless it is clearly erroneous or arbitrary, and the interpretation here is not." *Adirondack Transit Lines, Inc.* v. *United States, et al.*, 59 F. Supp. 503, 504, affirmed 324 U.S. 824. Our scope of review is limited. "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286-287.

In determining whether Pomprowitz was authorized to

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transport fresh meats and packing house products, the Commission had the right to give consideration to the fact that in plaintiff's "grandfather" proceeding of February, 1936, he was unable to show that during the requisite period he was engaged in the transportation of fresh meats and packing house products, and that he was likewise unable to prove that during that period he had served any packing house. The Commission also had the right to give consideration to the plaintiff's companion application to the 1936 proceeding in which he sought new authority to transport fresh meats and packing house products, which application was denied at the time he was granted authority to transport manufactured or prepared foods.

We have considered the request of plaintiff and intervenors that we remand this case to the Commission for further hearing on plaintiff's request for additional authority to extend their present operations to include transportation of fresh meats and packing house products. While it is undoubtedly true that plaintiff's principal endeavor at the hearing before the Commission was on the interpretation of his present authority, he apparently had a full opportunity to make such showing as he could on his alternative proposal for additional authority. We hold that the request to remand must be denied.

We hold that the Commission's interpretation of plaintiff's authority was neither arbitrary, capricious, nor clearly erroneous. We conclude there was a sufficient factual and legal basis for the Commission's challenged order. The complaint seeking an injunction to restrain the Commission's order of March 16, 1950, is dismissed.

Dated at Milwaukee, Wisconsin this 17 day of March, A. D. 1954.

(S.) F. Ryan Duffy,
U. S. Circuit Judge.
(S.) Patrick T. Stone,
U. S. District Judge.
(S.) Robert E. Tehan,
U. S. District Judge.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 5396

JOSEPH POMPROWITZ, a Sole Trader Doing Business as L. C. L. Transit Company, *Plaintiff*,

and

GEO. A. HORMEL & COMPANY and OSCAR MAYER & COMPANY, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact

The Court makes the following findings of fact:

1. Plaintiff Pomprowitz is a contract carrier by motor vehicle in interstate commerce operating under authority of a permit granted by the Interstate Commerce Commission on November 27, 1943, following extensive hearings on a "grandfather" application filed under the provisions of Section 209 (a) of the Interstate Commerce Act (49 U.S.C. Sec. 309 (a). Under the authority granted, the carrier was authorized to transport, insofar as pertinent here, dairy products, dairy by-products, manufactured or prepared foods, and material, supplies and equipment used or useful in the production of such commodities, and of household goods, under contracts with persons or companies who operate cheese and food processing businesses, within certain portions of Wisconsin, Minnesota, Iowa, and Illinois.

2. On February 14, 1947, the plaintiff motor carrier filed an application with the Commission seeking a determination of whether the phrase "manufactured or prepared foods," as contained in his aforesaid operating authority,

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includes fresh meats and packing-house products. In the event the Commission found otherwise the carrier sought additional authority under Section 209 (b) of the Act (49 U. S. C. Sec. 309 (b) to extend his present operations to include the transportation of fresh meats and packinghouse products. The application, which was supported by Geo. A. Hormel & Company and Oscar Mayer & Company, intervening plaintiffs herein, and opposed by 22 motor carriers and 2 motor carrier associations, was primarily for the purpose of obtaining an interpretation of the commodity description of the carrier's operating authority granted under the "grandfather" clause of Section 209 (a) of the Act (49 U. S. C. 309 (a)).

3. The application was assigned for hearing before a Commission examiner who was not at the time a hearing examiner appointed pursuant to the provisions of Section 11 of the Administrative Procedure Act (Title 5 U. S. C. Section 1010), but who was a duly appointed and qualified examiner under the Interstate Commerce Act. No objection was made to the qualifications of the examiner at the time of the hearings nor on exceptions filed by plaintiffs to the examiner's proposed report and order recommending findings that the "grandfather" authority issued to the carrier does not authorize the transportation of fresh meats and packing-house products. Division 5 of the Commission considered this report and on March 16, 1950, entered a report of its own containing findings of fact and the conclusion that the commodity description in the authority granted to the carrier to transport "manufactured or prepared foods" does not embrace fresh meats and packinghouse products. Petitions for reconsideration and further hearings filed by plaintiffs were denied by the entire Commission and additional petitions filed by plaintiffs for reconsideration and further hearings were dismissed by the Commission as being successive petitions based on the same grounds as a former petition which is prohibited by the Commissions' General Rules of Practice. In none of these petitions did plaintiffs raise any objections to the qualifications of the examiner who heard the application. Plaintiffs did not raise any objection to the qualifications of the

examiner until June 28, 1951, which was more than three years after the hearing before the examiner and approximately seven months after the plaintiff's petition for reconsideration of Division 5's report and order had been denied by the entire Commission.

4. The plaintiffs have not been prejudiced in any way by the conduct or manner of appointment of the examiner and there is no suggestion that he exhibited any bias, favoritism, or unfairness. Moreover, the Commission did not institute the proceedings and the examiner did not act, and was not expected to act, both as prosecutor and judge and neither did the Commission which appointed him nor the examiner exercise any function except to decide justly the issues raised in the Commission proceedings. Plaintiffs do not claim to have been misled or in any way hampered in ascertaining the facts about the examiner's appointment.

5. The Commission has found that plaintiff carrier was granted a permit after protracted "grandfather" proceedings in which he had failed to prove that he was engaged on and since July 1, 1935, in transportation of fresh meats and packing-house products, and that it had never intended to grant him authority to transport such commodities, and that the commodity description contained in his present permit to transport manufactured or prepared foods under contracts with persons who operate cheese and food processing businesses does not authorize the transporation of fresh meats or packing-house products, and also that the carrier had failed to prove that the institution of a new service in the transportation of these commodities, under Section 209 (b) (49 U. S. C. 309 (b)), would be consistent with the public interest and national transportation policy. The Commission has further found that fresh meats are not a manufactured or prepared foods within the meaning of the commodity description used in the authority granted to the carrier.

6. The Court adopts as its own the foregoing findings made by the Commission as shown in its report of March 16, 1950.

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Conclusions of Law

And the court sets forth the following as its conclusions of law:

1. The Commission had jurisdiction to hear and determine the issues involved in the proceedings which resulted in the order here under attack.

2. Due to the failure of plaintiffs timely to object to the qualifications of the examiner they cannot now be heard to complain as to his alleged lack of qualifications or that they were denied a fair hearing.

3. The plaintiffs were accorded a full, fair and legal hearing by the Commission.

4. Interpretation of plaintiff Pomprowitz's contract carrier permit is primarily a function for the Commission to perform, and its interpretation will not be disturbed by the Court unless clearly wrong or arbitrary which is not true in the instant case.

5. The findings made by the Commission, as set forth in its report of March 16, 1950, are supported by substantial evidence of record and are adequate to support the conclusion made by the Commission.

6. The order of the Commission entered in this cause denying plaintiffs' application is a legal and valid order.

7. The injunction prayed for by plaintiffs should be denied and the suit should be dismissed.

F. Ryan Duffy,
United States Circuit Judge,
Seventh Circuit.

Robert E. Tehan,
United States District Judge,
Eastern District of Wisconsin.

Patrick T. Stone,
United States District Judge,
Western District of Wisconsin.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

Civil Action No. 5396

JOSEPH POMPROWITZ, a Sole Trader, Doing Business as L. C. L. Transit Company, *Plaintiff*,

and

GEO. A. HORMEL & COMPANY and OSCAR MAYER & COMPANY, *Intervening Plaintiffs*,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants

DECREE

This cause coming on to be heard before the undersigned, constituting a special District Court of three judges convened pursuant to 28 U. S. C. A. 2484(1), and 2325, upon an application for an interlocutory injunction; and being heard upon the evidence introduced before the Interstate Commerce Commission and the reports and orders of the Commission, as well as upon the arguments and briefs of counsel; and the cause, by consent of the parties, having been submitted for final decree; and the Court having made its findings of fact and conclusions of law which are filed herewith:

Now, therefore, upon the basis of such findings of fact and conclusions of law, and for the reasons set forth in the opinion of the Court herewith filed, it is ordered, adjudged and decreed that the injunction and other relief prayed for in the complaint be denied and that the suit be dismissed.

This the 17 day of March, 1954.

F. RYAN DUFFY,
United States Circuit Judge,
Seventh Circuit;

ROBERT E. TEHAN,
United States District Judge,
Eastern District of Wisconsin;

PATRICK T. STONE,
United States District Judge,
Western District of Wisconsin.

APPENDIX C

PERMIT

P-37

No. MC 31466 *

JOSEPH POMPROWITZ, Doing Business as L. C. L. Transit Company, Green Bay, Wisconsin

At a Session of the Interstate Commerce Commission, Division 5, held at its office in Washington, D. C., on the 23rd day of February, A. D., 1949

After Due Investigation, It appearing that the above-named carrier has complied with all applicable provisions of the Interstate Commerce Act, and the requirements, rules, and regulations prescribed thereunder, and, therefore, is entitled to receive authority from this Commission to engage in transportation in interstate or foreign commerce as a motor carrier; and the Commission so finding;

It is ordered, That the said carrier be, and it is hereby, granted this Permit, subject, however, to such terms, conditions, and limitations as are now, or may hereafter be attached to the exercise of the privileges herein granted, to engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce, under special and individual contracts or agreements, for the transportation of:

REGULAR ROUTES:

Canned goods,

Between Belvidere, Ill., and Minneapolis, Minn.:

From Belvidere to Minneapolis as specified below, and return over the same routes to Belvidere.

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* This permit covers the authority granted in the permit issued in this proceeding on December 11, 1945, in MC 31466 (BMC 10) on August 9, 1944, including the consolidations noted thereon, as modified by the order of December 1, 1948 in MC 31466 (BMC 10).

And with persons (as defined in Section 203(a) of the Interstate Commerce Act) who operate meat packing houses, the business of which is the processing, manufacture, and sale of packing house products, of the commodities indicated and in the manner specified below:

Packing house products and *supplies for packing houses,*

Between Minneapolis, Minn., and Chicago, Ill., and Milwaukee, Wis.:

From Minneapolis over U. S. Highway 12 via Fairchild, Wis., to Madison, Wis., and thence over U. S. Highway 14 via Janesville, Wis., to Chicago;

From Minneapolis to Madison as specified above, thence over U. S. Highway 18 to Milwaukee, Wis., and thence over U. S. Highway 41 to Chicago;

From Minneapolis to Madison as specified above, thence over U. S. Highway 151 to junction Wisconsin Highway 19, thence over Wisconsin Highway 19 to junction U. S. Highway 16, thence over U. S. Highway 16 to Milwaukee, and thence over U. S. Highway 41 to Chicago;

From Minneapolis over U. S. Highway 169 via Mankato, Minn., to Blue Earth, Minn., and thence over U. S. Highway 16 via Albert Lea, Minn., to Milwaukee;

From Minneapolis over U. S. Highway 65 to Albert Lea, Minn., thence to Milwaukee as specified above;

From Minneapolis over city streets to St. Paul, Minn., thence over Minnesota Highway 56 to junction Minnesota Highway 55, thence over Minnesota Highway 55 to Hastings, Minn., thence over U. S. Highway 61 to La Crosse, Wis., and thence over U. S. Highway 16 to Milwaukee;

From Minneapolis to Mankato as specified above, thence over U. S. Highway 14 via Owatonna, and Winona, Minn., and Madison, Wis., to Chicago;

From Minneapolis to Owatonna as specified above, thence over U. S. Highway 218 via Waterloo, Iowa, to Cedar Rapids, Iowa, and thence over U. S. Highway 30 to junction unnumbered highway, thence over unnumbered highway via Emerson, Ill., to junction U. S. Highway 330, thence over U. S. Highway 330 via Dixon, Ill., to Chicago;

From Minneapolis to Waterloo, Iowa, as specified above, thence over U. S. Highway 20 via Belvidere, Ill., to Chicago;

From Minneapolis to Fairchild, Wis., as specified above, thence over U. S. Highway 10 to Fremont, Wis., thence over Wisconsin Highway 110 to Oshkosh, Wis., and thence over U. S. Highway 41 to Milwaukee;

From Minneapolis to Janesville, Wis., as specified above, thence over U. S. Highway 51 to Rockford, Ill., and thence over U. S. Highway 20 to Chicago; and

Return over the above-specified routes to Minneapolis.

Service is authorized to and from the intermediate and off-route points of Mankato, Albert Lea, Winona, Owatonna, St. Paul, South St. Paul, Newport, and Fairmont, Minn.; La Crosse, Madison, Milwaukee, Janesville, Cudahy, Racine, and Kenosha, Wis., and Rockford and Waukegan, Ill., without restriction, and Fairchild, Wis., Dixon, Ill., and Waterloo, Iowa, restricted to pick-up or delivery of packing house products and supplies for packing houses.

IRREGULAR ROUTES:

Automobile tires, oils, and *greases,*

Between Chicago, Ill. on the one hand, and, on the other, Milwaukee, Green Bay, Fond du Lac, Oshkosh, Neenah, Appleton, Menasha, Kaukauna, New London, Clintonville, Marion, Wausau, Shawano, Bonduel, Pulaski, Antigo, Seymour, Shiocton, Blackcreek, Manawa, Port Washington, Sheboygan, Manitowoc, Two Rivers, Kewaunee, Sturgeon Bay, Algoma, Casco, New Franken, Plymouth, Kiel, New Holstein, Chilton, Hilbert, Greenleaf, Suamico, Abrams, Pensaukee, Oconto, Marinette, Crivitz, Coleman, Pound, and Lena, Wis.

Cheese,

From Algoma, Appleton, Blue River, Cleveland, Edgar, Fond du Lac, Green Bay, Juneau, Manitowoc, Marathon, Marinette, Marchfield, Platteville, Plymouth, Reedsville, Richland Center, Sawyer, Seymour, Sherwood, Spring Green, Two Rivers, and Zachow, Wis., to Milwaukee, Wis.,

with no transportation for compensation on return except as otherwise authorized.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate meat packing houses, the business of which is the processing, manufacture, and sale of packing house products, for the transportation of the commodities indicated and in the manner specified below:

Such merchandise as is dealt in by meat-packing plants, and *supplies, materials,* and *equipment* used or useful in such plants,

Between Milwaukee and Cudahy, Wis., on the one hand, and, on the other, Florence, and Niagara, Wis., and points and places in Iron, Ashland, Price, Oneida, Lincoln, and Taylor Counties, Wis., and those in the Upper Peninsula of Michigan.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate wholesale grocery houses, the business of which is the sale of food, for the transportation of the commodities indicated and in the manner specified below :

Such merchandise as is dealt in by wholesale food business houses, and in connection therewith, *equipment, materials,* and *supplies* used in the conduct of such business,

Between Chicago, Ill., on the one hand, and, on the other, points and places in Wisconsin.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) who operate food canneries or meat-packing houses, the business of which is the sale of the commodities described below for the transportation of the commodities indicated and in the manner specified below:

Canned foods,

From Blue Island, Ill., to St. Paul, South St. Paul, Minneapolis, and Minnesota Transfer, Minn.

From South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points and places in that part of Wisconsin on and east of a line beginning at the junction

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of the Wisconsin-Illinois-Iowa State lines near Dubuque, Iowa, and extending along the Mississippi River to La Crosse, Wis., thence along U. S. Highway 53 to Cameron and on and south of a line beginning at Cameron and extending along U. S. Highway 8 to the Wisconsin-Michigan State line.

From Chicago to St. Paul, Minneapolis, South St. Paul, Winona, and Rochester, Minn., and La Crosse, Wis.

Fresh meats, dairy products, and *packing house products* and *supplies.*

From South St. Paul to Grand Forks, N. Dak., Chicago and Rockford, Ill., and points and places in the Wisconsin Territory specified above.

From Chicago to St. Paul, Minneapolis, South St. Paul, Winona and Rochester, Minn., and La Crosse, Wis.

Return, with no transportation for compensation except as otherwise authorized to the above-specified origin points.

And with persons (as defined in section 203 (a) of the Interstate Commerce Act) (1) who operate meat packing houses and (2) cheese processing businesses, for the transportation of the commodities indicated and in the manner specified below:

Fresh meats, canned foods, dairy products, and *packing house products and supplies.*

From South St. Paul, Minnn., to points and places in that part of Illinois on and north of U. S. Highway 6, except Chicago and Rockford, Ill., with no transportation for compensation on return except as otherwise authorized.

Dairy and similar food products and supplies,

Between points and places in that part of Minnesota, on, south and east of U. S. Highway 8 and on and east of U. S. Highway 169, including Columbia Heights, Robbinsdale, St. Louis Park and Hopkins, Minn., in the so-called Twin Cities area, those in that part of Wisconsin, on and south of U. S. Highway 8, and those in that part of Illinois, on and north of U. S. Highway 6.

With persons (as defined in Section 203 (a) of the Interstate Commerce Act) who operate vegetable canning busi-

nesses, for the transportation of the commodities indicated and in the manner specified below:

Canned foods, materials and *supplies* and *equipment* used or useful in vegetable canning businesses,

Between Durand, River Falls, and Cumberland, Wis., Duluth, Minn., points and places in Wisconsin within a territory on and south of Wisconsin Highway 54 and on and east of U. S. Highway 51, those in Minnesota within a territory on and east of U. S. Highway 169, on and south of Minnesota Highway 36, and on and north of U. S. Highway 14, those within a territory in Iowa on and east of U. S. Highway 69, on and north of Iowa Highway 92, and U. S. Highway 67, and on and south of U. S. Highway 18, and points and places within a territory in Illinois on and north of U. S. Highway 36.

Vegetable canning machinery,

From Muscatine, Iowa and Chicago, Ill., to Oostburg, Eden, Mount Calvary, and Plymouth, Wis., with no transportation for compensation on return except as otherwise authorized.

And with persons (as defined in Section 203 (a) of the Interstate Commerce Act) who operate businesses for the manufacture, sale and distribution of general merchandise direct to consumers, for the transportation of the commodities indicated and in the manner specified below:

Such commodities, as are dealt in by the persons specified immediately above.

From Freeport, Ill., to Dubuque, Iowa, and Minneapolis, Minn.

Printers' rollers, spices, paper boxes and cartons, and *returned or rejected shipments,*

From Minneapolis, Minn., to Freeport, Ill.

Return, with no transportation for compensation except as otherwise authorized, to Freeport and Minneapolis.

And with persons (as defined in Section 203 (a) of the Interstate Commerce Act) who operate cheese and food

processing businesses, for the transportation of the commodities indicated and in the manner specified below:

Dairy products, dairy by-products, manufactured or prepared foods, and *materials, supplies* and *equipment,* used or useful in the production thereof, and *household goods* as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

Between St. Louis, Mo., Barron, Rice Lake, Superior, and Ashland, Wis., and Duluth, Minn., points and places in that part of Wisconsin on and south of Wisconsin Highway 64 from Marinette to Merrill, on and east of U. S. Highway 51 from Merrill to Wausau, on and south of Wisconsin Highway 29 from Wausau to junction of U. S. Highway 12 near Elk Mount, and on and south of U. S. Highway 12 from that junction to Wisconsin-Minnesota State line, including points and places in Kewaunee and Door Counties, Wis., points and places in that part of Minnesota on and east of U. S. Highway 169 and on and south of U. S. Highway 12, Ottumwa, Burlington, and Keokuk, Iowa, points and places in that part of Iowa on and south of U. S. Highway 18 from Marquette to Garner, on and east of U. S. Highway 69 from Garner to Des Moines, and on and north of U. S. Highway 6 from Des Moines to Davenport, points and places in Illinois on and north of U. S. Highway 36, points and places in Indiana, and points and places in Michigan except those in that part of the Lower Peninsula of Michigan north of the northern boundary of Muskegon, Kent, Montcalm, Gratiot, Midland, Gladwin, Arenac, and Iosco Counties.

It is further ordered, That this permit shall be effective from the date hereof, and shall remain in effect until suspended, changed, or revoked as provided in said Act.

And it is further ordered, That this permit shall supersede the permit issued in this proceeding and in MC 31466 (BMC 10) on December 11, 1945, and August 9, 1944, respectively, which are hereby canceled.

By the Commission, division 5.

W. P. Bartel,
Secretary. (Seal)

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HAROLD B. WILLEY, Cl

No. 167

IN THE

Supreme Court of the United States

October Term, 1954

JOSEPH POMPROWITZ, GEORGE A. HORMEL & COMPANY, AND OSCAR MAYER & COMPANY, *Appellants,*

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *Appellees.*

On Appeal from the United States District Court for the Eastern District of Wisconsin

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Brief of Appellants in Opposition to Motion to Affirm Filed by the United States and Interstate Commerce Commission

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In The

Supreme Court of the United States

October Term, 1954

Joseph Pomprowitz, George A. Hormel & Company, and Oscar Mayer & Company, *Appellants*,

v.

United States and Interstate Commerce Commission, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Wisconsin

---

Brief of Appellants in Opposition to Motion to Affirm Filed by the United States and Interstate Commerce Commission

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Preliminary Statement

This is appellants' reply, under authority of Rule 7(3), to a motion to affirm filed by appellees the United States and Interstate Commerce Commission. For convenience appellees will be referred to as the Government. The motion was received on May 28, 1954.

The motion and our Jurisdictional Statement describe the proceedings in the Court below and before the Interstate Commerce Commission. The report of the Commission under review is entitled *Pomprowitz Extension*—

Packing House Products, 51 M.C.C. 343, and is an appendix to the Jurisdictional Statement. The decision of the Court below is also reproduced as an appendix to appellant's Jurisdictional Statement. (119 F. Supp. 824)

Statement of Additional Facts

The motion does not state certain facts which should be before the Court when considering the motion in question. They are as follows:

The Commission as a result of a decision in 1943 issued a permit to a contract motor carrier to transport "dairy products, dairy by-products, manufactured or prepared foods" under contracts with "cheese and food processing businesses." (The permit is Appendix C to the Jurisdictional Statement.) Not until 1950 did the Commission say that "manufactured or prepared foods" did not include, for example, fresh sausage and (perhaps) smoked sausage, i.e., fresh meats and (perhaps) cured meats.

Beginning in May 1944 the motor carrier began entering into contracts with a few meat packers to transport fresh meats and packing-house products. (For present purposes, unless otherwise apparent, the term "packing-house products" will be understood to embrace salted, cooked, cured, preserved meats, and other edible meat products not including those which come within the term "fresh." See Ex Parte No. MC-38, *Modification of Permits—Packing House Products*, 46 M.C.C. 23, 33; and Ex Parte No. MC-45, *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, 272.)

Since 1944 the motor carrier has increased his equipment and facilities, and these meat packers have established important markets in the territory embraced by the permit. The Interstate Commerce Act provides that the Commission may not restrict the right of the carrier to substitute or add contracts, or to add to his equipment and facilities, within the scope of his permit, as the

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development of the business and the demands of the public may require—Section 209(b) of the Interstate Commerce Act [49 U.S.C. 309(b)]

A recitation of the "lulling" by the Commission of the motor carrier and these shippers, and additional facts, are set forth in the Jurisdictional Statement. The Government did not answer or deny any of the statements therein contained.

If, in 1943, the Commission did not intend that fresh meats and edible packing-house products were included, it is significant that in 1946 the Commission's District Director having jurisdiction advised the motor carrier that he could haul them.

Here the Commission, years later, in effect, criticizes its own action, and seeks to cause the motor carrier and shipper to suffer as a result thereof.

Here the Commission hides behind its own failure to prohbit the filing[1] of contracts and rate schedules if they are contrary to the authority granted in the permit.

The Questions Presented Are Substantial

A motion to affirm is not sustainable unless it be shown that "the questions on which decision of the cause depends are so unsubstantial as not to need further argument." (Rule 7, par. 4)

This appeal presents substantial questions of general and fundamental importance in the administration of the motor carrier phase of the Interstate Commerce Act.

If the Commission may reduce or limit the extent of a motor carrier's authority, six years after issuance of a permit, then the holder of a permit has no security in the permit, nor can he rely upon the action of the governmental agency issuing it.

---

[1] The contracts with shippers and the schedules of rates must be filed with the Commission. Section 220(a) of the Act [49 U.S.C. 320(a)].

The basic question involved as to whether the Commission has authority to reduce the scope of a contract carrier's permit years after issuance, affects not only appellant carrier and appellant shippers herein, but also all carriers holding permits or certificates issued by the Commission, and all shippers making use of motor carrier facilities—both contract and common.

If the Commission can go behind a permit issued by it and, as a result, limit the scope of the simple language used in the permit, as the Commission is doing here, then the words of the statute requiring the Commission to define the scope of the authority in the permit are meaningless, and a permit serves no purpose.

A number of substantial questions of law, set forth in the Jurisdictional Statement, are presented by this appeal.

Argument

May we preface our argument by urging that consideration should be given to the ambiguity of the Commission's decision assailed here. It is certainly not clear whether the Commission holds that the transportation of edible packing-house products comes within the scope of the authority granted, and whether the only questionable commodities are fresh meats and inedible packing-house products. And, mark you, the lower Court did not attempt to "spell out" [1] what the Commission held.

Throughout, the language of the decision seems to indicate that edible packing-house products come within the term "manufactured or prepared foods" and that applicant may continue to transport them, but may not handle fresh meats or inedible packing-house products.

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[1] *United States* v. *C., M., St. P. & P. Ry. Co.*, 294 U.S. 499 510. See also *Secretary of Agriculture* v. *United States*, (No. 480) decided by this Court June 8, 1954.

On page 345 of the printed decision (51 M.C.C.) the Commission states "Applicant for some time has been transporting fresh meats under color of his authority to transport prepared and manufactured foods." It will be observed that packing-house products are not mentioned there, even though the carrier had for the same length of time been transporting them with the fresh meats.

On the same page the Commission indicates that it is the opinion of one of the shippers that fresh meats are a prepared food. No mention is there made of packing-house products, which we also contend are "manufactured or prepared foods."

Again, on page 346 reference is made to a shipper who handles fresh meats, as well as "items not intended for human consumption."

In referring to two other shippers, on page 346 of the printed decision, the Commission states that they interpret applicant's authority as embracing "fresh meats and *other* packing-house products." (Our emphasis) We assume "other" means inedible.

In referring to still another shipper, on page 347, the question of interpretation seems to be confined to fresh meats.

On page 348, the Commission indicates that the principal question posed by applicant is whether the term "manufactured or prepared foods"

> "embraces packing-house products *generally* and fresh meats *in particular*. In our opinion it does not. In the first place, the term in question contemplates only those food items which are fit for human consumption, and necessarily excludes, therefore, the numerous packing-house products not so adapted." (Our emphasis)

In other words, the term includes edible packing-house products, but not inedible.

Where the Commission refers to "packing-house products *generally*," we assume the term "generally" is added

to indicate the inedible products. We have yet to see any authority granted by the Commission to handle "packing-house products, *generally.*" So far as we know, this is the first time that expression has been used by the Commission.

At the top of page 349 it appears that the term "packing-house products" embraces certain "prepared foods" but not all articles contained in the appendix to Ex Parte No. MC-38, *Modification of Permits—Packing House Products,* 48 M.C.C. 628.

The Commission says that to construe the authority in question as authorizing the transportation of fresh meats would be unreasonable and contrary to the sense in which the term was used. (Page 349 of the decision) Mark you, fresh meats only are mentioned.

In the next sentence the Commission states that despite the preliminary process, fresh meats are not a manufactured or prepared food. (Page 349 of the decision) Again, the Commission does not speak of edible packing-house products.

And in the next sentence the Commission says that fresh meats may become a manufactured or prepared food only after they have been converted from their "natural state" into a different form. (Page 349 of the decision) Does that mean that a fresh leg of pork becomes a manufactured or prepared food when it becomes a ham and therefore comes within the term "manufactured or prepared food" and may be transported by applicant? Surely a leg of pork in its "natural state" is not livestock and therefore exempt from regulation—see Section 203(b)(6) of the Interstate Commerce Act. [49 U.S.C. 303(b)(6)]

These various explanations leave the impression that the Commission approves the handling of edible packing-house products under the authority granted, but not fresh meats. We are at a loss to understand the differentiation. We say that because, within the category of fresh meats are not only carcass meat but also many types of

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fresh sausage, etc. Not only as to the latter but as to the former is there a detailed manufacturing and preparing process. They are certainly not in their "natural state."

The decision of the Commission is not definite. Must we subject ourselves to further Court action—criminal or civil—in order to determine what the Commission meant and what the lower Court meant.

In connection with the impossibility to "spell out" what the Commission means, by its decision, we beg leave to refer to its decisions in Ex Parte Nos. MC-38 and 45, *supra*. In those decisions the Commission included "Meats, fresh, salted, cooked, cured and preserved." In other words, in one expression it combined fresh meats and packing-house products. It also included "sausage" without differentiating fresh or smoked. It included all kinds of canned and packaged meats and meat products. It included cheese and other dairy products. It included lard substitutes, etc. (46 M.C.C. 23, 33, 34; 61 M.C.C. 209, 272, 273)

In its decision in Ex Parte No. MC-45, the Commission said:

> ". . . There is very little movement of truckload shipments of fresh meat or other single commodities. In practically all instances the movement is in mixed truckloads of meats and packing-house products and occasionally dairy products." (61 M.C.C. 209, 230)

We believe it to be error for the Commission and the lower Court not to "spell out" what is meant.

What has been said clearly demonstrates that the only foundation for the decision of the Commission and the lower Court must be ascertained not in the plain language of the permit, but what went before its issuance, which is not permissible.

The Government goes back of the permit and relies upon a footnote in an unreported decision dated November 27, 1943, to determine the "intent" of the Commission". The Government even says that "No meat or packing-

house products are included" in the list in the opinion of 1943. (Page 3 of the Motion) But meat packers produce and ship sandwich spreads, soups, [both of which would come within canned meat and byproducts] cheese and other dairy products, oleomargarine, lard substitutes, and the like, which are specifically named in the footnote in that unreported opinion. See appendixes to Ex Parte Nos. MC-38 and 45.

May we emphasize the fact that a permit stands on its own bottom. It does not refer to the decision itself and make the decision a part of the permit. An "order" of the Commission does that. But that is not so as to a permit. In other words, the four corners of a permit, and the four corners alone, are supposed to speak. It is the last word.

It is the carrier's authority to roll. It is held out to the world by the Commission as a description of what may be done and what may not be done. If that is not so, why issue a permit.

We do not believe that it is contemplated under the Interstate Commerce Act that where plain language is used, as is set forth in this permit, it is required that one must go back to the antecedents of the permit in order to determine what the plain words of the permit mean.

In that connection it will be noted that the Government, in going back of the permit, refers to a contract with Kraft. (Page 3 of Motion) Sight should not be lost of the fact that the Act specifically authorizes a contract carrier to substitute or add contracts within the scope of the permit, add to his equipment and facilities, and the like—in fact, the Commission is prohibited from restraining the contract carrier of that right. Section 209 (b) of the Act [49 U.S.C. 309(b)]

In the unreported decision on which the Government and the lower Court rely, and back to which they go for support, it is stated that Pomprowitz then (in 1943) owned and operated 82 pieces of equipment, i.e., 38 trac-

tors, 36 semi-trailers, and 8 straight trucks. (Sheet 8 of mimeographed Commission opinion) When the decision here under attack was rendered, Pomprowitz owned and operated 172 pieces of equipment, consisting of 3 passenger cars, 5 pick-up vehicles, 69 tractors, and 79 semi-trailers. (51 M.C.C. 344)

In its decision in *Pomprowitz Extension—Indiana—Michigan*, 9 M.C.C. 301, the Commission authorized the handling of "dairy products, prepared foods, and other commodities requiring refrigeration or similar protective service" between Indiana and Michigan. That authority has been combined with the same phase of the motor carrier's permit here under consideration, the territorial scope being added at the end. (See last portion of permit which is Appendix C of the Jurisdictional Statement.) In other words, the commodity description in the permit was made broad enough to include commodities coming within the above description.

The Government states that the Commission's interpretation of language in a certificate or permit is controlling, unless clearly unreasonable, and it cites the following cases: *Adirondack Transit Lines* v. *United States*, 59 F. Supp. 503, 504 (S.D.N.Y.), affirmed, 324 U.S. 824; *Dart Transit Co.* v. *Interstate Commerce Commission*, 110 F. Supp. 876, 880 (D. Minn., 4 D.), affirmed, 345 U.S. 980; *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 342 U.S. 830. (Page 2 of Motion) None of those cases is relevant here.

In the *Adirondack* case the question was whether a certificate authorizing transportation across the Hudson River included passing through a tunnel not in existence when the certificate was issued. The case is inapt.

In the *Dart* case authority was granted to transport packing-house and dairy products, equipment, material, and supplies, and canned goods and canning factory supplies. Among the questions presented were: Would that

authorize the shipment of tin plate from Gary, Ind., to a manufacturer of tin cans; boxes for Waldorf Paper Company; glass bottles for the Toni Company; and cases or cartons from a box company to the Pepsi Cola Bottling Company. Questions like those are in no way similar to the question here presented. Here the permit is not ambiguous in any sense of the word.

In the *United Truck Lines* case the question related to territorial scope, and turned on what is an "off-route" point. We have here no technical language.

The Government states that general descriptions of commodities have unavoidable ambiguities. (Page 2 of Motion) Unquestionably, there are times when unavoidable ambiguities occur. But that situation is not here. We believe the language here is so plain that it is not even necessary to refer to dictionary meanings.

The Government states that "Commission and trade usage, history and context necessarily play a frequent and important role in the process of interpretation." (Page 2 of Motion) As for trade usage, we need only look at the fact that the Commission itself indicates that a meat packer processes foods, and the lower Court makes a similar holding.

The Government states that the interpretation by the Commission is "an eminently reasonable one." (Page 2 of Motion) If the interpretation of the Commission is "an eminently reasonable one," we are at a loss to know what the "interpretation" is. As we see it, we are unable to "spell out" what the Commission actually holds. The Commission itself is indefinite, so is the Court below.

In connection with the question whether the interpretation of the Commission is "an eminently reasonable one," we beg leave to refer to "Commission . . . usage" by citing a few of the reported decisions of the Commission which indicate that the holding of the Commission here is not reasonable, but arbitrary. All of these decisions were rendered prior to the one here under attack.

In *Matthews Extension of Operations—Frozen Foods*, 48 M.C.C. 137, 139, 146, authority was given to transport frozen foods. The Commission speaks of meat as "prepared food" in the following language:

> ". . . In the near future, it contemplates expanding its business especially in the prepared food line. It proposes to utilize the freezing and storage capacity of plants in the New York area for the preparation of frozen fish, *meat, and other prepared food products* during the off season for freezing fruits and vegetables. These frozen *prepared foods* would be shipped from points of storage in the New York area to various points in the territory involved herein, . . ." (Emphasis supplied.)

The language used in the findings should also be noted. It is said:

> "We find that the present and future public convenience and necessity require operation by applicant, in interstate or foreign commerce, as a common carrier by motor vehicle over irregular routes, (1) of frozen *foods* (a) between points in New York within 75 miles of and including Rochester, N. Y., on the one hand, and, on the other, New York, N. Y., Baltimore, Md., Washington, D. C., . . ., except frozen *meats* to and from the points named in paragraph 2 of the appendix hereto, . . ." (Emphasis supplied.)

This last quotation clearly indicates that when the Commission intends to restrict the word "food" so as not to include "meats" (within a given geographical area or otherwise) it does so in specific language for the words "food" or "prepared food" in a certificate or permit manifestly include meats, if not expressly excluded.

In *Growers Cold Storage Co., Inc., Extension of Operation*, 10 M.C.C. 725, applicant sought authority to handle "chiefly food products." The Commission stated at pages 726 and 727:

> "Applicant has been operating as a motor carrier since prior to July 1, 1935. It seasonably filed an application under the 'grandfather' clause of section 209(a) of the act, covering operations conducted by

it as a contract carrier of *'chiefly food products'* on July 1, 1935, and continuously since that time, embracing generally a portion of the same territory as here in issue. . ."

". . . Applicant is at present under written contact with approximately eight *food-product companies* for transporting and warehousing the various commodities, consisting principally of fresh or frozen fruits, vegetables, meats, poultry, and fish. . ." (Emphasis supplied)

Authority was granted to transport "food products, fresh or frozen," clearly including meats. To the same effect, see also *Growers Cold Storage Co., Inc., Extension of Operations,* 9 M.C.C. 563, 565.

In *Manners Common Carrier Application,* 3 M.C.C. 571, general commodity authority was given. The Commission stated, at page 573, as to certain of the operations:

"No. MC-20069—The operations to which this application relates have consisted principally of the transportation of *packing-house* and dairy products, groceries, *and other food products* from Nashville. . . ." (Emphasis supplied.)

In *Green Bros., Inc., Contract Carrier Application,* 18 M.C.C. 94, authority was sought and granted to transport "foodstuffs and restaurant equipment and supplies." The Commission said at pages 96 and 97:

"Special equipment has been used for the transportation of *foodstuffs* for Waldorf. This operation requires the use of insulated bodies that are built to accommodate the containers of various sizes which carry hot soups, *cold meats,* canned goods, fresh pies, fish, and *other foodstuffs. . . .*" (Emphasis supplied.)

In *Superior Packing Co.* v. *Clark,* 164 F. 2d 343, 349, the Court held that under the Emergency Price Control Act of 1942, 50 U.S.C.A. Appendix, Sec. 903:

"A live steer is an 'agricultural commodity,' produced on a farm and sold by a farmer in its raw, natural or unprocessed state. A beef carcass, a

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> wholesale cut, retail cuts such as steaks or roasts, beef brains, kidneys, hearts, livers, or other edible by-products, as well as meat products resulting from still further processing, such as sausages—these are all distinct commodities not produced on the farm and sold by farmers. They are not 'agricultural commodities', but commodities 'processed or manufactured in whole or substantial part' from an agricultural commodity, the live steer. The slaughterer's operation of producing these various meat products would be described as a processing operation in the everyday use of words, and it certainly is such from the point of view of the steer."

The words used in the permit here considered plainly include fresh meats and packing-house products.

The question here is as to "manufactured and prepared food." It does not embrace the non-edible articles produced by meat packers. They are not here.

The Government states that apart from the history of this permit the Commission in its opinion states that the term "packing-house products" "has long had a peculiar meaning of its own in the transportation industry." Also the Government points out that the opinion here under consideration indicates that a large variety of commodities which are not edible are transported under the term packing-house products which are not embraced by the term "foods". (Footnote 7, page 4 of Motion)

That there has *not* been a long-standing, peculiar meaning of the term "packing-house products" is indicated by the fact that the Commission instituted two proceedings in which that very question was considered. They are Ex Parte No. MC-38, decided December 19, 1945; and Ex Parte No. MC-45, decided October 20, 1952. Mark you, those decisions were rendered long subsequent to the time of the Commission's first decision which resulted in the issuance of this permit, and one was rendered after the decision here under consideration.

Even assuming that the term "packing-house products" has a peculiar meaning, that does not necessarily mean that it is not embraced by the term "foods."

And mark you, nowhere have we contended in this proceeding that the term "manufactured or prepared foods" embraces inedible packing-house products.

If the terms were so definitely understood, why was it necessary to institute Ex Parte No. MC-38, and even in 1952 again to define the term when used in certificates in Ex Parte No. MC-45?

Also note that MC-38 and MC-45 did not revise any outstanding permits. (46 M.C.C. 23, 31; 61 M.C.C. 214, 270)

Surely the Commission cannot rewrite a permit or certificate whenever a whim strikes it.

The word "food" has no *special* meaning in any industry, and has no limitations. The opposition point to no special definitions. If the Commission intends to restrict the scope of a permit, it does so in unmistakable terms. With great particularity the Commission restricts the territorial scope. In the very permit before the Court the Commission excepts part of Michigan.

If fresh meats and packing-house products had a special meaning, then they should have been exempted from the permit issued in this proceeding. It is customary for the Commission, whenever it intends to exempt commodities, specifically so to designate in certificates. Innumerable instances could be cited wherein the Commission has provided exemptions. As one of hundreds of illustrations, it will be observed that in *Faltin Motor Transp., Inc., Ext.—Alternate Route*, 51 M.C.C. 125, 129, the Commission, as is its usual custom, granted authority to transport "general commodities except those of unusual value, dangerous explosives, livestock, household goods . . . commodities in bulk, and commodities requiring special equipment."

It is interesting to compare the statement in the Commission's own decision:

> ". . . They (fresh meats) may become a manufactured or prepared food only after they have been converted from their natural state into a different form" (51 M.C.C. 349)

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with the contentions here made by the Government that fresh sausage and edible packinghouse products are not "manufactured or prepared foods."

In *American Fruit Growers* v. *Brogdex Co.*, 283 U.S. 1, 11, the Supreme Court said:

> "'Manufacture,' as well defined by the Century Dictionary, is 'the production of articles for use from raw or prepared materials by giving to these materials new forms, qualities, properties, or combinations, whether by hand-labor or by machinery.' Also, 'anything made for use from raw or prepared materials.'"

In *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, 547, wherein the Commission dwelt at great length upon the question what are "manufactured products" of agricultural commodities, the Commission held that the removal of the shell from an egg and the removal of the shell from raw peanuts changes the egg or the peanut into a manufactured product.

On April 9, 1951, in *Weldon* v. *Interstate Commerce Commission*, 188 F. 2d 367, the Court of Appeals for the Sixth Circuit affirmed the decision of the lower Court in *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873, 876, (W.D., Tenn., E.D.), "for the reasons set forth in the memorandum opinion of the District Court." (Certiorari denied, 342 U.S. 827) In that proceeding the lower Court held that raw shelled peanuts were "manufactured commodities" and not an exempt "agricultural commodity." The lower Court said:

> "Here the peanuts, after harvesting, are transported to a shelling plant where, by the use of elaborate machinery, the shell is removed, thereby leaving the kernel as one product and the shell as another. The peanut has then undergone its first manufacturing process and is no longer an agricultural commodity but has now been changed into a commercial item ready for its next successive process of manufacture which may include its removal to a crushing

> plant, where the kernels are further processed into such items as peanut oil and peanut butter."

The Government speaks of substantial parity between future operations and prior operations, and cites *Noble* v. *United States*, 319 U.S. 88. (Footnote 3, p. 2 of Motion) In the *Noble* case all the Court held was that the Commission had authority to designate the type of industry which could be served by a motor carrier under a given permit. That is taken care of here by the provision that contracts could be made with "cheese and food processing businesses," and the Commission in effect, and the Court specifically, held that a meat packer is in the food processing business. So that decision is not helpful here.

It seems rather anomalous that a concern can be in the food processing and manufacturing business but none of its products constitute manufactured or prepared food.

The proceeding in which the Commission established the principle of designating the type of industries for which a contract carrier may haul specified commodities was *Keystone Transp. Co. Contract Carrier Application*, 19 M.C.C. 475. That principle is termed by the Commission as the "Keystone" restriction. That is the "ruling case." Observe the following quotation from the Commission's February 18, 1953, decision in *Fischbach Trucking Co. Common Carrier Application*, 61 M.C.C. 539, 551:

> "In this connection, it is significant that with the restriction, inherent in a contract-carrier status, on the number of shippers which may be served and particularly when a 'Keystone' restriction has been imposed, grants of contract-carrier authority have been in many instances more liberal both territorially and commoditywise than would have been the case had common-carrier authority been involved. Actually the commodity descriptions now contained in applicant's permits are, in many instances, broad in language and peculiar to contract-carrier grants and some of them are circumscribed by 'Keystone' restrictions. . . ."

In the *Keystone* decision the Commission indicated that "applicants would haul a very wide variety of commodities, of which those shown in Appendix E are illustrative." (19 M.C.C. 480) In Appendix E the long list includes items such as dairy pro iucts, like cheese and margarine; vegetable oils, fresh meats, smoked and canned meats, etc. In the original *Keystone* decision the Commission authorized the Keystone Transportation Company to handle "such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, etc." (19 M.C.C. 483)

In the *Keystone* decision the Commission indicated that in the administration of the Act it has in several cases pointed out that a contract carrier under the permit granted may substitute or add contracts within the scope of the permit. And in several instances the Commission has refused to limit permits so as to preclude the carrier from transporting goods for a shipper other than that with which it had a contract at the time of the hearing. (19 M.C.C. 484, 485) It will, therefore, be observed that in the "Keystone" proceeding the terms used in the commodity description nowhere mention fresh meats or packing-house products, and yet there can be no question but what they were embraced thereby.

If the Commission intended to restrict the scope of the permit, it could have done so in simple unmistakable language. The Government and the lower Court refer to a "companion" case dealing with fresh meats and packing-house products. (Page 4 of Motion; third paragraph from end of decision of the lower Court.) The "companion" case merely demonstrates that the Commission did not commit an inadvertent error, and emphasizes that if it intended to exclude fresh meats and packing-house products, it should have done so, because it had the subject squarely before it.

In addition, if the Commission "intended" to exclude meat packers from the businesses with which the carrier

might contract, it could have and should have said so. Of course, the Commission could not confine the permit to one concern—Kraft—because of the restriction in Section 209(b) of the Act [49 U.S.C. 309(b)].

As pointed out by this Court, there is no "unfettered power in the Commission to change the certificate at will." That would violate Section 212(a) of the Act [49 U.S.C. 312(a)]. *United States* v. *Rock Island M. Trans. Co.*, 340 U. S. 419, 435.

Significant, because of its absence here, is the fact that neither the Commission nor the lower Court even mentions the statutory provision dealing with the modification or change of a permit.

True, the Commission has a wide discretion in determining the scope of authorities it grants. But that discretion ends after the permit is issued and the motor carrier starts rolling on basis of that permit.

This Court in the *Carolina Carriers* case [1] said that the Commission may not "atomize" too closely. In the discretion of the Commission it may use generic terms or it may use specific terms. But when it speaks in the permit, it is through speaking. The permit must speak for itself. It is the document to which the world and the Courts must look. It is not for the Government to hide behind any improprieties as to the Commission's own action.

Let us see what the Commission has said on this subject.

In *Atlantic Frt. Lines, Inc.—Petition for Declaratory Order*, 51 M.C.C. 175, 190, the Commission said:

> "Finally, it is contended that we could not have made a valid grant of the authority in question because no evidence was presented upon which to predicate a finding that petitioner's predecessors had engaged in such commerce on and continuously since

[1] *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475.

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June 1, 1935. By this argument we are, in effect, asked to review the underlying evidence to determine if it in fact supports the authority granted in the certificate. This we cannot lawfully do. The 'grandfather' rights of petitioner have been determined after exhaustive proceedings involving three hearings and its certificate issued. Section 212(a) of the act provides the only procedure for the revocation of certificates, and that section can be invoked only 'for willful failure [on the holder's part] to comply with any provision of this part, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate . . .' Construing this section, the entire Commission in *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465, stated:

> 'In our opinion, the language of the foregoing section is clear and definite and unmistakably shows that Congress intended that a certificate, once effective, may be terminated by us only on the conditions, and according to the procedure, therein specifically provided. We may issue decision upon decision, and order upon order, on an application for a certificate so long as sufficient reason therefor appears and until all controversy is determined, but once a certificate, duly and regularly issued, becomes effective, our authority to terminate it is expressly marked off and limited. All the antecedent decisions and orders are essentially procedural in character, and may be set aside, or vacated, but the certificate marks the end of the proceeding, just as the entry of a final judgment or decree marks the end of a court proceeding.'

"This opinion was cited with implied approval by the Supreme Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424. Thus, having found that petitioner's transportation between the points in question was bona fide and in interstate commerce, and having issued a certificate accurately reflecting such findings, we may not now review the underlying evidence to determine if it was sufficient to support such findings. That litigation is closed."

In *Coastal Tank Lines, Inc.*, v. *Charlton Bros. Transp. Co., Inc.*, 48 M.C.C. 289, 299, 300, 301, 302, the Commission said:

> ". . . While it is true, as pointed out by complainants, where the terms of a certificate are patently ambiguous, as was the case in *Manhattan Coach Lines, Inc.*, v. *Adirondack Transit Lines*, 43 M.C.C. 477,[1] it is proper to consider antecedent matters in order to ascertain the true meaning. There is no ambiguity in the language of defendant's certificate here. The only question here is whether the defendant is conducting unauthorized operations. The answer to that question must be found in the language contained in the certificate. . . .
>
> "In the light of the foregoing, it is clear that in this proceeding, the sole criterion, as to whether the defendant is conducting unauthorized operations, is the terms of the certificate. In the *Campbell Sixty-Six* case [46 M.C.C. 222] the Commission made it abundantly clear, that intentions or representations as to limitations of the type of service to be conducted, even when contained in reports under which certificates are issued, are of no significance in determinations of whether a service is being performed in accordance with the terms of the certificates. The definitions of commodity groups in the *Classification* case hardly can have greater significance when they are not referred to in the certificate. . . .
>
> ". . . Interpretations of certificates based on classifications of motor carriers, or on the basis of matters antecedent to the issuance of a certificate, the terms of which are not patently ambiguous, can only lead to instability in the motor carrier industry and uncertainty among their patrons as to the operating rights of motor carriers. Here there is no ambiguity in the terms of defendant's certificate, to the extent in question, and only the terms of the certificate may be looked to in determining its operating rights. . . .

[1] This is the Commission decision which was under attack in *Adirondack Transit Lines* v. *United States*, to which reference is made hereinbefore.

"While it may be that when the certificate was originally issued to the defendant, petroleum products, in bulk, in tank trucks, should have been excepted from the grant of authority, they were not, and we may not now by interpretation, so modify the certificate. Such action in the circumstances here disclosed would amount to a partial revocation of the defendant's certificate without benefit to it of the procedure provided in section 212(a) of the act. Compare *Tidewater Transfer Co., Inc., Extension—Wines in Bulk,* 47 M.C.C. 496."

In other words, once issued, a certificate or permit must be recognized for what it says. It may not be modified or revoked except for the reasons specifically recited in the statute. None of those reasons exists here.

In *United States* v. *Seatrain Lines,* 329 U.S. 424, 430, 432, this Court said:

". . . But in ruling upon its power to revoke motor carrier certificates, the Commission itself has held that unless it can find a reason to revoke a motor carrier's certificate, which reason is specifically set out in section 212(a), it cannot revoke such a certificate under its general statutory power to alter orders previously made. Re *Smith Bros. Revocation of Order,* 33 M.C.C. (F) 465.

". . . But, as the Commission has said as to motor carrier certificates, while the procedural 'orders' antecedent to a water carrier certificate can be modified from time to time, the certificate marks the end of that proceeding.[7] The certificate, when finally granted and the time fixed for rehearing it has passed, is not subject to revocation in whole or in part except as specifically authorized by Congress. Consequently, the Commsision was without authority to revoke Seatrain's certificate. That certificate, properly interpreted, authorized it to carry commodities generally, including freight cars, on the routes for which the certificate originally issued. . . ."

"[7] See Re Smith Bros. Revocation of Certificate, and Re Quaker City Bus Co. (F) both supra." [33 M.C.C. 465 and 38 M.C.C. 603, respectively]

In addition, we beg leave to refer to the fact that the Commission had in other cases previously held that the term "foods" included fresh meats and packing-house products, as hereinbefore indicated.

We contend that the Commission's action here is arbitrary, capricious, and contrary to law.

The Government refers to certain permits purchased by the motor carrier embracing meats and packing-house products in a large part of the area covered by the permit in question. (Page 4 of Motion) The fact is that the last of the purchases was sought by application filed June 27, 1944 (MC-F-2572), prior to the issuance of the final permit here considered, i.e., before the motor carrier knew definitely what authority would be granted under the grandfather application. Also, in the purchase of that authority the motor carrier's real concern was authority to transport asphalt, asbestos, and magnesia products from Waukegan, Ill., to Milwaukee, Wis. Again, in the motor carrier business one carrier will buy out another to remove competition.

The Government states that there is no challenge made of the correctness of the Commission's findings that the evidence does not establish "a need for a grant of authority to engage in the described transportation." (Page 5 of Motion) We do challenge that statement. The mere existence of the movement of the traffic here in question over the number of years it has moved, and the fact that it is in volume, establishes a definite need for the authority sought. And in that connection we specifically requested further hearing to develop more fully that fact, having been of the belief that the primary question before the Commission was the one of interpretation—our going to the Commission having been at the insistence of the District Director of the Commission.

The lower Court specifically stated that "it is undoubtedly true that plaintiff's principal endeavor at the hearing before the Commission was on the interpretation

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of his present authority." (Next to last paragraph of the lower Court's Opinion) In this connection may we refer to the decision in *Salvino* v. *United States,* 119 F. Supp. 277, where the United States District Court for the Western District of Washington, N.D., on February 24, 1954, said:

> ". . . Briefly, it is our opinion that the order would deprive plaintiff of a substantial part of his existing business without a full and adequate hearing. Again we quote from the language of the Supreme Court in *Morgan* v. *United States, supra,* [304 U.S. 1] at page 22, emphasizing the basic requirement that a full and fair hearing be accorded parties in controversies before administrative agencies:
>
> > " 'The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they were created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.' "

See also *Matlack* v. *United States,* 119 F. Supp. 617, Eastern District of Pennsylvania, March 31, 1954.

Where the record before the Commission is principally based upon interpretation of the permit issued by the Commission in an application for that interpretation filed at the insistence of an official of the Commission, the Commission is guilty of abuse of discretion in failing further to hear the proceeding to obtain a record on the question of the issuance of a new permit.

It is interesting to note the closeness of the vote of the Commission denying our petition to rehear. Of the Commissioners on the Division which initially decided the

case, the vote was two to one; and the vote of the whole Commission was six to five.

May we refer to the views of former Commissioner Aitchison expressed before a Senate subcommittee in connection with certain pending bills concerning the obligations of administrative agencies, which were quoted by a three-judge Court for the Southern District of New York on March 21, 1951, in *Isbrandsten Company v. United States*, 96 F. Supp. 883, 892:

> "'They [administrative agencies] are not expected merely to call balls and strikes, or to weigh the evidence submitted by the parties and let the scales tip as they will. The agency does not do its duty when it merely decides upon a poor or nonrepresentative record. As the sole representative of the public, which is a third party in these proceedings, the agency owes the duty to investigate all the pertinent facts, and to see that they are adduced when the parties have not put them in . . . The agency must always act upon the record made, and if that is not sufficient, it should see the record is supplemented before it acts. It must always preserve the elements of fair play, but it is not fair play for it to create an injustice, instead of remedying one, by omitting to inform itself and by acting ignorantly when intelligent action is possible . . .'"

The failure of the Commission further to hear is error.

Conclusion

Because of the substantial questions of vital public importance presented by this appeal—questions which have never been passed upon by this Court—appellants respectfully pray that the motion to affirm be denied, and that the case proceed to a determination on its merits.

Respectfully submitted,

Warren H. Wagner
Attorney for Appellants

Certificate of Service

I hereby certify that I have this date served copies of the attached Brief of Appellants in Opposition to Motion to Affirm upon Simon E. Sobeloff, Esq., Solicitor General, Department of Justice, Washington, D. C., and Edward M. Reidy, Esq., Chief Counsel, Interstate Commerce Commission, Washington, D. C., by causing copies thereof to be mailed to them at their respective addresses.

WARREN H. WAGNER
Attorney for Appellants

Dated at Washington, D. C.
June 16, 1954

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN

CIVIL ACTION NO. 5396

JOSEPH POMPROWITZ, A SOLE TRADER, DOING BUSINESS AS L. C. L. TRANSIT COMPANY, PLAINTIFF; GEORGE A. HORMEL & COMPANY AND OSCAR MAYER & COMPANY, INTERVENERS,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

MOTION TO AFFIRM

Pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, appellees, United States of America and Interstate Commerce Commission, move that the judgment of the district court be affirmed.

This is a direct appeal, pursuant to 28 U.S.C. 1253, from a final judgment entered on March 17, 1954, by a specially constituted three-judge district court convened pursuant to 28 U.S.C. 2284 and 2325, dismissing an action brought by appellant motor carrier (Joseph Pomprowitz) to set aside an order of the Interstate Commerce Commission.[1]

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[1] Intervener-appellants (George A. Hormel & Company and Oscar Mayer & Company) are customers of Pomprowitz.

Appeal was allowed on May 13, 1954, and appeal papers were served on May 14, 1954.

Appellant motor carrier applied to the Commission for a determination that the words "manufactured or prepared foods," as used in a permit issued to him under the "grandfather" provisions of the Interstate Commerce Act, included the right to carry fresh meats, packing-house products, and materials and supplies used by meat-packing houses. The carrier also requested that, in the event the Commission should determine that the outstanding "grandfather" permit did not authorize such operations, a new permit be issued to cover them.

The Commission, after full hearing, denied the application, determining (a) that the "grandfather" permit did not authorize the carriage of fresh meats and packing-house products and (b) that the carrier had failed to establish that there was a need warranting the proposed new authorization. The district court, in a careful opinion, sustained the Commission's order.[2]

1. The Commission's interpretation of language which it has incorporated in a certificate or permit is controlling, unless clearly unreasonable. *Adirondack Transit Lines* v. *United States,* 59 F. Supp. 503, 504 (S.D.N.Y.) affirmed, 324 U.S. 824; *Dart Transit Co.* v. *United States,* 110 F.

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[2] Both the Commission's opinion (51 M.C.C. 343) and the opinion of the district court are appended to the statement as to jurisdiction.

Supp. 876, 880 (D. Minn.), affirmed, 345 U.S. 980; *United Truck Lines* v. *Interstate Commerce Commission*, 189 F. 2d 816, 817 (C.A. 9), certiorari denied, 342 U.S. 830. As experience attests, generic descriptions of commodities, whether used in instruments of authorization or in carrier tariffs, have unavoidable ambiguities. Whether a particular commodity is covered cannot invariably, if indeed ordinarily, be determined by simple reference to the dictionary. Commission and trade usage, history and context necessarily play a frequent and important role in the process of interpretation. Examination of the facts and circumstances which bear on the meaning of the language used in appellant's permit makes clear that the Commission's interpretation here was an eminently reasonable one.

Appellant's permit was granted to him after protracted "grandfather" proceedings instituted by an application filed on February 3, 1936.[3] See See *Joseph Pomprowitz Contract Carrier Application, No. MC-31466*, 28 M.C.C. 241; 43 M.C.C. 821; 43 M.C.C. 822.[4] The permit ultimately issued

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[3] The "grandfather" provision relating to contract carriers by motor vehicle appears in section 209 (a) of the Interstate Commerce Act (49 U.S.C. 309 (a)). As this Court has stated, its purpose is to assure "substantial parity between future operations and prior [i.e., prior to Federal motor-carrier regulation] *bona fide* operations," *Noble* v. *United States*, 319 U. S. 88, 92.

[4] The opinions in 43 M.C.C., dated November 27, 1943, and June 29, 1944, are not fully reported.

provides in pertinent part that appellant may conduct contract-carrier operations for persons

> Who operate cheese and food processing businesses: of dairy products, dairy by-products, manufactured or prepared foods, and materials and supplies and equipment used or useful in the production thereof * * *.

The grant of this authority was predicated upon a finding that, during the "grandfather" period, appellant had transported, under contract with Kraft-Phenix Cheese Corporation, cheese, oleomargarine, mayonnaise products, salad dressing, sandwich spreads, and similar prepared food items. *Id.*, opinion of November 27, 1943, sheets 5-6. A list of Kraft-Phenix products is fully set forth in the opinion. *Ibid.* No meat or packing-house products are included.[5]

Moreover, the opinion of November 27, 1943, explicitly stated (sheet 12), "It should be observed that applicant's 'grandfather' application made no claim of rights to transport fresh meats and packing-house products * * *."

Even more conclusive is the fact that in 1942, while the "grandfather" proceedings were pending, appellant filed an application under section 209 (b) (49 U.S.C. 309 (b)) for new authority to carry, *inter alia*, such "merchandise as is dealt in by meat packing plants." This application was

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[5] The same is true of the list appearing in the Commission's opinion on reconsideration, dated June 29, 1944 (sheet 3).

denied in the very same opinions and orders which resulted in the issuance of appellant's "grandfather" permit.[6] The denial was based, not upon a conclusion that appellant already had such authority, but upon a specific finding to the effect that there was no need for the service for which authority was sought and that issuance of a permit would not be "consistent with the public interest and the national transportation policy." See opinion of November 27, 1943, sheet 13.

It thus appears that the opinions and orders issued in 1943 and 1944 expressly denied appellant what he now seeks by way of an interpretation. No appeal was taken from those decisions. Cf. *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512-513.

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[6] The Commission stated in the opinion issued in the instant case (51 M.C.C. at 349):

> His permit was granted after protracted "grandfather" proceedings in which he specifically claimed the right to transport fresh meats and packing house products. In granting manufactured or prepared foods, the Commission, division 5, denied authority to transport fresh meats and packing house products; and in a companion application disposed of at the same time, No. MC-31466 (Sub-No. 2), it found that the requested authority to transport such commodities would not be consistent with the public interest or the national transportation policy. See Pomprowitz Contract Carrier Application, 28 M.C.C. 241, 43 M.C.C. 821, and 43 M.C.C. 822.

Appellant's effort to secure authority to transport fresh meats and packing-house products was actually pressed, in the earlier proceedings, in connection with his 1942 application for new authority.

The facts not only refute the suggestion that the Commission's interpretation is arbitrary, but likewise demonstrate that appellant's contention that he was misled is entirely without foundation. In this latter connection, it is also relevant to point out that appellant since 1940, has purchased permits from other motor carriers which authorize him to carry meat and packing-house products in a large part of the area covered by appellant's "grandfather" permit. Tr., p. 16.

We submit that the record fully supports the conclusion that the words "manufactured and prepared foods," as used in appellant's "grandfather" permit, did not grant, and could not have been intended to confer, authority to carry fresh meats and packing-house products.[7]

2. No challenge is made as to the correctness of the Commission's finding that the evidence does not establish "a need for a grant of authority to engage in the described transportation." It is suggested, however (see question 5, statement as to jurisdiction), that the evidence adduced at the administrative hearing was directed primarily to the matter of interpretation of the existing permit, and that the district court erred in failing to

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[7] Apart from the history of the "grandfather" proceedings and the other relevant facts peculiar to this case, the Commission points out in its opinion that the term packing-house products "has long had a peculiar meaning of its own in the transportation industry." The opinion also notes that the term covers a large variety of commodities which are not edible and are certainly not encompassed by the language "manufactured and prepared foods."

remand the case to the Commission "to permit the taking of further testimony." As the district court stated, and as appellant implicitly concedes, there was "full opportunity" at the administrative hearing to introduce evidence in support of the request for additional authority. The burden of showing a need for service rests squarely on the party seeking authorization. Appellant's failure to sustain that burden is scarcely a ground for setting aside the order of the Commission.

CONCLUSION

The decision of the district court is clearly correct. The case presents no question of general or substantial importance. The judgment should be affirmed.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.

EDWARD M. REIDY,
Chief Counsel,
Interstate Commerce Commission.

MAY, 1954.

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No. 167

IN THE

Supreme Court of the United States

October Term, 1954

JOSEPH POSTSCRIPT, GEORGE A. HORMEL & COMPANY, and OSCAR MAYER & COMPANY, *Appellants*,

v.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Wisconsin

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APPELLANTS' PETITION FOR RECONSIDERATION OF AFFIRMATION OF DECISION OF LOWER COURT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 167

JOSEPH POMPROWITZ, GEORGE A. HORMEL & COMPANY, and OSCAR MAYER & COMPANY, *Appellants*,

v.

UNITED STATES and INTERSTATE COMMERCE COMMISSION, *Appellees*.

On Appeal from the United States District Court for the Eastern District of Wisconsin

---

APPELLANTS' PETITION FOR RECONSIDERATION OF AFFIRMATION OF DECISION OF LOWER COURT

Appellants, on the grounds following, petition for reconsideration of the October 14, 1954, per curiam affirmation of the decision below:

Highly significant proceedings having arisen since our reply to the Motion to Affirm

Subsequent to the submission of our brief in reply to the Motion to Affirm, significantly relevant proceedings have come before this Court, or will ultimately reach the Court during this term. Also subsequent to the submission of our reply to the Motion to Affirm, conflicting positions have been taken by the Interstate Commerce Commission in certain proceedings as compared with that taken by it

in this proceeding. Appellants, in this petition for reconsideration, beg leave to submit those new matters for the Court's consideration, in addition to some of the grounds heretofore presented.

In MC-C-1605, *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express*, decided unanimously by the whole Interstate Commerce Commission on July 13, 1954, (subsequent to the filing of our reply to the Motion to Affirm) the Commission had before it a complaint alleging that defendant motor carrier was hauling fresh and frozen meats and fresh and frozen dressed poultry[1] without a certificate from the Commission authorizing such haulage. The Commission in that case held that both fresh meats and dressed poultry were manufactured commodities, and issued a cease and desist order. That is directly contrary to the holding of the Commission in the present proceeding, wherein it held that fresh meats are not manufactured commodities.

In the *East Texas* case the Commission said:

> " . . . Nevertheless, we shall review it briefly and later we shall refer to other evidence designed to show that fresh and frozen meats which are the products of the slaughter of ordinary livestock are, in any event, manufactured products.
>
> "Cattle are raised on farms and ranches and generally are shipped alive by the growers to stockyards operated by, or in conjunction with, meat packing companies. The slaughtering process begins only after the animals reach the stockyards and consists of (1) holding the cattle in pens, including resting, watering, and feeding, (2) killing, including knocking shackling, hoisting, and bleeding, (3) skinning and cutting, (4) washing, (5) stamping, scaling, and grading, (6) hot clothing, and (7) chilling. In processing the animals for slaughter, various mechanical and other aids are

[1] New York dressed poultry is poultry with only the head and feathers removed. Eviscerated poultry has the head, feet, feathers and entrails removed; and the liver, heart and gizzard cleaned, wrapped and replaced in the carcass. The Commission held that both of them are manufactured commodities.

employed, such as pens, runways, pulleys and chains, overhead conveyors, electric saws, mechanical slides, water heaters, ribbon branders, and chilling systems entailing the use of brine tanks, pumps, and related gear. . . .

"The evidence also contains, in exhibit form, numerous booklets, manuals, pamphlets, and statistical studies published in 1929 and later by various Federal agencies, including the Executive Office of the President and U. S. Departments of Commerce and Labor, indicating that, for industrial classification purposes, the slaughter of livestock, meat packing, and the dressing of poultry are regarded as manufacturing activities. As examples, in a 1933 publication of the Bureau of the Census, U. S. Department of Commerce, entitled Foreign Commerce and Navigation of the United States, meats are classified as dutiable imports under the listing of 'Manufactured Foodstuffs'. Four manuals issued by the Bureau of the Budget, Executive Office of the President, in 1940, 1943, 1945, and 1946, variously entitled Standard Industrial Classification, Standard Industrial Classification Manual, or Standard Commodity Classification, all classify meat packing and poultry dressing as manufacturing industries, and the products thereof as manufactured foods. A 1950 publication of the U. S. Department of Commerce entitled *Schedule A* Statistical Classification of Imports into the United States lists fresh and frozen meats and dead, dressed, or undressed poultry as 'Meat Products'. 'Meat Products' is listed under the broader classification of 'Agricultural Manufactured Foodstuffs and Beverages'." (Sheets 6 and 7)

Those quotations from that new decision of the whole Commission should be compared with the contrary holding of the Commission here.

In the *East Texas* case petition for injunction was filed in the District Court for the Southern District of Texas, Houston Division. (No. 8396, *Frozen Food Express, et al.* v. *United States, et al.*) It will be heard by a three-judge Court this month. We understand that the parties are seeking expedition so that the proceeding will reach this Court during the present term.

In its petition for a writ of certiorari (filed subsequent to our reply to the Motion to Affirm, and denied October 14, 1954) in No. 264, this term, *Interstate Commerce Commission* v. *Kroblin*, the Commission said:

> " . . . If Congress had intended slaughtered farm animals to be exempt, it would not have stopped by exempting ordinary livestock but would have exempted the meat products thereof. Obviously, therefore, Congress did not intend to exempt the meat products of ordinary livestock. By the same token, if Congress did not intend to exempt slaughtered animals and meat products, it logically follows that it did not intend to exempt killed and dressed poultry. Surely Congress did not intend to give the poultry packers advantages which it had not given meat packers. . . .
>
> " . . . If the Court's interpretation as to dressed poultry stands, what is to prevent the extension of the exemption to embrace all meat products and bring the gigantic packing industry within the exemption, destroying the value of hundreds of certificates and permits as well as bringing chaos and instability to the packing industry? At least so far it has not been contended that a beef carcass or the meat products of slaughtered farm animals are within the exemption, or that they are agricultural commodities simply because the animals were raised on the farm. Yet cattle and hogs are products of the farm just as is poultry. The principal difference between the two is the size of the animals and perhaps the degree of processing occasioned by the size of the animals. . . ." (Page 19)

The position taken by the Commission in that new proceeding is contrary to the position it took in the present proceeding. And in that case the United States took no part.

In the present case the Commission stated that fresh meats "may become a manufactured or prepared food only after they have been converted from *their natural state* into a different form." (51 M.C.C. 343, 349) That undoubtedly

means that any edible meat product beyond the carcass stage is considered to be a manufactured or prepared food. That would include fresh sausage, any edible packing-house products, and the like. But we go further: In "their natural state" fresh meats are not fresh meats but live animals. Therefore, "fresh meats" themselves are manufactured foods. As stated by the Commission in its petition for a writ of certiorari in No. 264, *Interstate Commerce Commission* v. *Kroblin*, filed since our reply to the Motion to Affirm, the District Court for the Western District of Tennessee in *Interstate Commerce Commission* v. *Weldon*, 90 F. Supp. 873, 875, 876, in speaking of the transportation of raw shelled peanuts said that to be not manufactured products, they must be "in their natural state," i.e., unshelled. Here carcass meats are, in fact, further manufactured than shelled peanuts. See quotation in our reply to Motion to Affirm, page 12, from *Superior Packing Co.* v. *Clark*, 164 F. 2d 343, 349, holding that the live steer is in its natural state and the carcass, etc., is a manufactured product. See also quotations hereinbefore from the Commission's new decision in the *East Texas* case, describing the slaughtering process, and specifically stating that the products "are, in any event, manufactured products."

Restated, in those two new proceedings the Commission has taken a position contrary to the position it took in the present proceeding.

The law does not contemplate that whim may dictate when the Commission may say fresh meat is a manufactured product and when it may say it is not manufactured.

In this connection, observe that the Commission has on a number of prior occasions included meats when issuing permits to haul "foods." (Reply to Motion to Affirm, pp. 10-13)

The Commission has not "explained its departure from prior norms and has not . . . spelled out the legal basis of its decision." (*Secretary of Agriculture* v. *United States*, 347 U.S. 645, decided June 7, 1954)

Additional grounds which warrant denial of Motion

The Commission's jurisdiction to revise "orders" is different from its jurisdiction to revise permits. The Court below failed to recognize that difference. (Commission's decision quoted in our reply to Motion to Affirm, and cited with implied approval by this Court in *United States* v. *Seatrain Lines, Inc.*, 329 U.S. 424; pages 10 to 16 and 19 to 22 of reply to Motion to Affirm)

A permit may be changed only on the conditions outlined in Section 212(a) of the Motor Carrier Act. The Commission and the lower Court permitted revision of the permit without either of those conditions being present. (Reply to Motion to Affirm, pp. 18-21)

The Commission or the Court may not go back of a permit to determine "intention" where there are no technical terms or ambiguity, as here. (Reply to Motion to Affirm, pp. 15-22)

This Court, in *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, said that the Commission may not "atomize" too closely. In the discretion of the Commission it may use generic terms or it may use specific terms. Here it used generic terms. But when the Commission speaks in the permit, it is through speaking. The permit must speak for itself. It is the document to which the world and the Courts must look. It is not for the Government to hide behind any improprieties in the Commission's own action. (Reply to Motion to Affirm, p. 18)

The language in the permit includes fresh meat and packing-house products. Other decisions of the Commission so indicate. (Reply to Motion to Affirm, pp. 10-13)

The Commission lulled appellants into the belief that the permit granted the authority in question. (Juris-

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dictional Statement, p. 7; reply to Motion to Affirm, pp. 2-3)

The Commission stated that the principal question posed is whether "manufactured or prepared foods" embraces "packing-house products generally and fresh meats in particular." The Commission defined what it meant by "packing-house products *generally*" (a new term in the industry) when it said, in the next line, that "the term in question [manufactured or prepared foods] contemplates only those food items which are fit for human consumption, and necessarily excludes, therefore, the numerous packing-house products not so adapted." (Jurisdictional Statement, p. 22) One of the purposes of filing supplemental applications was to obtain authority to haul the inedible products. Nowhere have we contended that "manufactured or prepared foods" embraces inedible packing-house products.

Here, as in this Court's decision in *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (decided June 7, 1954),

> "the Commission has not explained its decision 'with the simplicity and clearness through which a halting impression ripens into reasonable certitude. In the end we are left to spell out, to argue, to choose between conflicting inferences. Something more precise is requisite in the quasi-jurisdictional findings of an administrative agency. . . . We must know what a decision means before the duty becomes ours to say whether it is right or wrong.' *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510-511."

If we are to disregard the permit, as contemplated by the decisions of the Commission and the lower Court, and go back of the permit to the findings in the decisions leading up to the permit or even go back of them to the text of the decisions, to learn what was authorized, we run into hopeless confusion. We are at a loss to know which controls—(1) the permit, which, under the statute, is the

last word, (2) the findings in the decision, which is the next to last word, or (3) the text of the decision,* which is the first word, but which in many instances may be but a passing remark carrying no conclusion. The following tabulation illustrates that.

The bracketed number references and emphasis are ours. Commodity description as recited in the Permit [1] in question:

"And with persons (as defined in Section 203(a) of the Interstate Commerce Act) who operate [2] *cheese and* [3] *food processing businesses,* for the transportation of the commodities indicated and in the manner specified below:

"Dairy products, dairy by-products, [4] *manufactured* or prepared foods, and [5] *materials, supplies and equipment,* used or useful in the production thereof, and [6] *household goods* as defined in Practices of Motor Common Carriers of Household Goods, 17 M.C.C. 467."

	November 27, 1943[1]	August 4, 1938[2]
DECISIONS:		
TERRITORY:	"From to, and between points in Wisconsin, Minnesota, Iowa, Illinois, and Missouri." (Syllabus)	"From and to points in Indiana and Michigan, except in the northern part of the Lower Peninsula of Michigan." (Syllabus)
FINDINGS:	"[7] *who operate cheese and food processing businesses,* of dairy products, dairy by-products, [8] *manufactured* or prepared *foods,* and [9] *materials and supplies and equipment,* used or useful in the production thereof, and [6] *household goods.*" (Sheet 14 of mimeographed decision)	"dairy products, prepared foods, and [10] *other commodities requiring refrigeration or similar protective service.*" (9 M.C.C. 304)

* Not available either in the printed volumes of the Commission's decisions or in the Federal Register.

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COMMODITIES DESCRIBED IN TEXT OF DECISION:

November 27, 1943[1]	August 4, 1938[2]
"[11] *Cheese, oleomargarine,* mayonnaise products, salad dressings, *sandwich spreads,* confectioneries, *milk* and *cream,* dried milk products, *milk, butter,* horseradish, frozen cream, *eggs (fresh, frozen, or dried),* dried vegetables, *soup,* table sauce, flavoring compounds, *lard substitutes, dairy by-products,* raw materials, advertising supplies, and supplies used in the manufacture and distribution of the above-named commodities, factory equipment and office supplies." (Footnote 4, sheet 5, of mimeographed decision)	"Those written contracts embrace the transportation of cheese, cream, and *various dairy products* and also [12] *any other commodities offered for shipment by the Kraft companies.* Obviously, there are many commodities which the Kraft companies never offer for transportation. They are engaged primarily in the production and sale of dairy products and various food commodities, but they also use quite a number of different [13] *supplies,* such as sugar, spices, and other ingredients, and [13] *materials* used about their plants, [13] *display racks, containers,* and certain by-products, such as [14] *animal feeds.* The term 'dairy products and [15] supplies used in the manufacture and sale of cheese and prepared foods' embraces substantially all commodities they offer for transportation. Most of those *commodities require refrigeration and other protective service.*" (9 M.C.C. 302)

[1] *Joseph Pomprowitz Contract Carrier Application,* No. MC-31466, decided November 27, 1943, not printed.

[2] *Joseph Pomprowitz Extension—Indiana-Michigan,* 9 M.C.C. 301.

[1] The terms in the permit here considered are those in the finding in the 1943 decision, but do not resemble the finding in the 1938 decision, even though the permit embraces both.

[2] The permit requires that the contract must be with a "cheese or food processing business." The finding in the 1938 decision does not so require. Therefore, may any one in another business enter into a contract if he ships any of the commodities, notwithstanding the wording of the permit?

[3] The Commission says meat packers are engaged in the processing of foods, and the lower Court held that these meat packers are in the food processing business. Therefore, may not a contract be made with a meat packer?

[4] The term "manufactured" is used in the finding in the 1943 decision, but not in the finding in the 1938 decision. That term is used in the list of commodities in the text of the two decisions in connection with the use of supplies, etc., in the manufacture of various commodities.

[5] The expression "materials, supplies and equipment" in the permit appears in the finding in the 1943 decision, but not in the finding in the 1938 decision. In other words, there is no finding as to them in the 1938 decision even though the permit authorizes them to be hauled. May they be hauled from Indiana?

[6] The permit authorizes the hauling of "household goods." However, no mention of that commodity is made anywhere in the 1938 decision. May they be hauled from Indiana? In footnote 4, sheet 5, of the mimeographed 1943 decision, which purportedly sets forth the commodities hauled for Kraft, no mention is made of household goods. One must look elsewhere in the text of that decision for reference thereto.

[7] The Commission's finding in the 1943 decision confines operations to cheese and food processors, whereas the 1938 decision does not, even though the permit carries that restriction. May a contract be

made with one in Indiana who is not a food processor?

[8] The finding in the 1943 decision and the permit authorize "manufactured . . . foods" whereas the 1938 decision does not. May they move from Indiana?

[9] The finding in the 1943 decision and the permit authorize "materials and supplies and equipment" whereas the finding in the 1938 decision does not. May they move from Indiana?

[10] The finding in the 1938 decision includes, without restriction, "other commodities requiring refrigeration or similar protection," whereas neither the 1943 decision nor the permit authorize that. May "other commodities requiring refrigeration" be hauled from Indiana, or only from Indiana and not from other points? That finding would unquestionably include fresh meats and packing-house products, most of which require such protection.

[11] The Government in its Motion to Affirm said that "No meat or packing-house products are included" in the list in the Commission's opinion of 1943. (Page 3 of the Motion) Among the "manufactured or prepared foods" listed in the footnote in the 1943 decision which are shipped by meat packers are the following: Cheese, oleomargarine, sandwich spreads, milk and cream, milk, butter, eggs (fresh, frozen, or dried), soup, lard substitutes, and dairy by-products. These are specifically embraced by the lists set forth in the appendices of the decisions of the Commission in Ex Parte MC-38, *Modification of Permits—Packing House Products,* 46 M.C.C. 23, 48 M.C.C. 628, and Ex Parte MC-45, *Descriptions in Motor Carrier Certificates,* 61 M.C.C. 209, the latter rendered subsequent to the decision here under consideration. In the former decision, the Commission specifically stated that the objective was that carriers holding permits

"should be authorized to render a complete service in the special type of transportation in which they were engaged." (48 M.C.C. 628, 635) If only those specifically listed in that footnote may be hauled, why did the Commission not set them forth in the permit rather than use the additional term "manufactured or prepared foods"? In the 1938 decision the finding specifically includes "other commodities requiring refrigeration."

[12] The text of the 1938 decision speaks of "any other commodities offered for shipment by the Kraft companies." What the commodities might be next year, for example, no human being can anticipate. If Kraft went into the meat packing business could all of its commodities be hauled, but not for another meat packer? Yet, if we must go back of the permit, we assume that the authority covers Kraft. But observe that the Commission indicates that the motor carrier had contracts with about a dozen shippers other than Kraft, even including a meat packer. (Appendix A of 28 M.C.C. 241, 246) The statute specifically authorizes additional contracts with others. (Reply to Motion to Affirm, p. 8)

[13] The 1938 decision speaks in its text of "supplies . . . materials . . . display racks, containers," but the finding of the decision does not include them. However, the wording of the permit includes them. May they nevertheless be hauled from Indiana?

[14] The 1938 decision speaks in its text of "animal feeds." They are not embraced by the findings. May they be transported because within the terms of the permit as "dairy by-products"?

[15] In the text of the 1938 decision reference is made to "supplies." The findings make no mention of them, but the permit does. May they be hauled from Indiana?

Such confusion can not be avoided without relying entirely upon the terminology of the permit, as contemplated by the law.

Superimposed upon the indefiniteness with which we are confronted by thus going back of the permit, is the further indefiniteness of the Commission's own description of what products shipped by meat packers come within the term "manufactured or prepared foods." (Reply to Motion to Affirm, pp. 4-8)

The Commission and the United States in their Motion to Affirm referred to a statement in the 1943 decision that the motor carrier's "grandfather" application made no claim of rights to transport fresh meats and packing-house products. (Page 3 of Motion) It will be observed that the motor carrier's "grandfather" application was for authority to transport "general commodities" which would include fresh meats, packing-house products, etc. (28 M.C.C. 241; sheet 1 of the 1943 decision) While the commodities listed in the footnote on sheet 5 of the 1943 decision purport to be those shipped by Kraft, in the text on the same sheet under the subject "'Grandfather' Application" reference is made to testimony concerning the hauling of fresh meats and packing-house products. In the appendix to the prior report in that proceeding are listed the names of three meat packers as shippers being served, i.e., Plankinton Packing Company, Milwaukee, Wis., Swift & Company of Chicago, Ill., and St. Louis Independent Packing Company of St. Louis, Mo. (28 M.C.C. 241, 246) So, in connection with the "grandfather" application, in the 1943 decision itself reference is made to uncontradicted testimony relative to the very commodities here considered.

The Commission has been far from uniform in its interpretation of the terms here in question. The present interpretation is not of "long standing." In fact, it conflicts with both prior and even subsequent holdings. It is certainly not a decision arrived at after careful consideration. The holding is arbitrary and capricious.

May we submit the following excerpts from the recommended report of the Examiner who heard the proceeding:

". . . Because of his contention that he already has this authority, most of the testimony for applicant is not on the point of necessity for service. . . .

". . . While most of the traffic he handles is composed of foods, the variety is great. . . .

"Applicant has been ill for a long while. Since, on the record here, the recommendation must be to deny the application, the best solution would be to deny it on the general grounds that the proposed operations would not be consistent with the public interest or with the national transportation policy. This would leave applicant's organization free to re-study its regulatory situation and to take such further steps as they deem proper."

We petitioned for further hearing and reconsideration, but that petition was denied by the close vote of 6 to 5. (Reply to Motion to Affirm, pp. 23, 24)

Conclusion

Because of the substantial questions of vital public importance presented by this appeal—questions which have never been passed upon by this Court—appellants respectfully pray that the Court reconsider its decision of October 14, 1954, and that the motion to affirm be denied, and that the case proceed to a determination on its merits.

Respectfully submitted,

WARREN H. WAGNER,
Attorney for Appellants,

Certificate

The foregoing petition for reconsideration is believed to be meritorious and is presented in good faith and not for delay.

November 4, 1954.

WARREN H. WAGNER,
Attorney for Appellants.

Certificate of Service

I hereby certify that I have this date served copies of the attached Petition of Appellants for Reconsideration of Affirmation of Decision of Lower Court upon Simon E. Sobeloff, Esq., Solicitor General, Department of Justice, Washington, D. C., and Edward M. Reidy, Esq., General Counsel, Interstate Commerce Commission, Washington, D. C., by causing copies thereof to be mailed to them at their respective addresses.

WARREN H. WAGNER,
Attorney for Appellants.

Dated at Washington, D. C.
November 4, 1954.

No. 167. POMPROWITZ, DOING BUSINESS AS L. C. L. TRANSIT COMPANY, ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Eastern District of Wisconsin. *Per Curiam:* The motion to

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affirm is granted and the judgment is affirmed. *Warren H. Wagner* for appellants. *Solicitor General Sobeloff* and *Edward M. Reidy* for the United States and the Interstate Commerce Commission, appellees. Reported below: 119 F. Supp. 824.